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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9852

ERNESTINA G. FLEISCHMAN, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the District Court of the United States
for the District of Columbia

JOINT APPENDIX

513 Filed in Open Court Mar 31 1947

Charles E. Stewart, Clerk

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

January Term, 1947

United States of America v. Edward K. Barsky, Jacob Auslander, Lyman R. Bradley, Marjorie Chodorov, Howard Fast, Ernestina G. Fleischman, Leverett Gleason, Harry M. Justiz, Mrs. Samuel Kamsley, Ruth Leider, James Lustig, Manuel Magana, Louis Miller, Herman Shurllin, Charlotte Stern, Jesse Tolmach, Mrs. Bobbie Weinstein

Criminal No. 368-47
Grand Jury Original
Violation 18 U. S. C. 88 and 2 U. S. C. 192
(Conspiracy to commit contempt, and contempt, of House
of Representatives Committee)

The Grand Jury charges:

Identity of Defendants

The defendants named in this indictment were all members of the governing body—known as the Executive Board—of the Joint Anti-Fascist Refugee Committee, an unincorporated association having its main office at 192 Lexington Avenue, New York, N. Y. The names of the defendants are as follows:

Edward K. Barsky
Jacob Auslander
Lyman R. Bradley
Marjorie Chodorov
Howard Fast
Ernestina G. Fleischman
Leverett Gleason
Harry M. Justiz
Mrs. Samuel Kamsley
Ruth Leider
James Lustig
Manuel Magana
Louis Miller
Herman Shumlin
Charlotte Stern
Jesse Tolmach
Mrs. Bobbie Weinstein

Throughout the period of time hereafter mentioned in this indictment the Committee on Un-American Activities of the House of Representatives was conducting the investigation authorized by the Resolution by virtue

of which the Committee existed, that is, Resolution H. Res. No. 5 of the 79th Congress, dated January 3, 1945. The nature of this investigation appears from that Resolution. It may be generally described as an investigation into subversive and Un-American propaganda activities in the United States which attack the principle of the form of government guaranteed by the Constitution of the United States. The Committee on Un-American Activities will be referred to hereafter in this indictment as the Congressional Committee. The investigation just described will be referred to as the matter under inquiry. The Joint Anti-Fascist Refugee Committee will be referred to as the association.

During the period mentioned, the Congressional Committee was seeking to obtain access to records of the association upon the matter under inquiry and in particular issued, among others, subpoenas directed to each of the defendants and a subpoena directed to the association by name requiring the production before the Congressional Committee on April 4, 1946, at Washington, D. C., of records of the association which were upon the matter under inquiry.

Charging Part

Throughout the period beginning about October 1, 1945, and continuing to a date several days after April 4, 1946, in the District of Columbia and in and near the City of New York, the defendants conspired to defraud the 515 United States and to commit offenses against the United States as are more particularly set forth in paragraphs (a) and (b) immediately following.

(a) The defrauding of the United States was to consist of interfering with a function of its government; that is, preventing the Congressional Committee from obtaining access to records of the association which were upon the matter under inquiry. This object was to be accomplished by encouraging Miss Helen R. Bryan, Executive

Secretary of the association, in refusing to produce those records before the Congressional Committee as required by subpoenas issued and to be issued by authority of the House of Representatives; by causing the custody of those records to remain in Miss Bryan instead of transferring the custody to another who would produce the records before the Congressional Committee, as the defendants had power to do; and by refusing themselves to produce those records before the Congressional Committee as required by subpoenas issued and to be issued by authority of the House of Representatives, which the defendants had power to do.

(b) The offenses against the United States were to consist of violations of Section 192 of Title 2 of the United States Code, in wilfully making default of subpoenas issued by authority of the House of Representatives and directed to and served upon each of the defendants requiring them to produce records of the association upon the matter under inquiry before the Congressional Committee, and to cause and assist Miss Helen R. Bryan wilfully to make default of a like subpoena directed to the association by name and served upon her.

Overt Acts

In pursuance of the conspiracy charged in this indictment and to effect the objects thereof the defendants did among others the following overt acts:

516 1. In about February, 1946, in and near the City of New York, the defendants, as members of the Executive Board of the association, held a meeting, at which some were physically present and others participated by telephone.

2. On April 4, 1946, in the City of Washington the defendants appeared before the Congressional Committee and each and all of them intentionally responded to inquiries put to them as witnesses in such way as not to disclose to the Congressional Committee whether they would or would not allow the Congressional Committee to have access to the records of the association.

SECOND COUNT:

The parts of the first count of this indictment entitled "Identity of Defendants" and "Introduction" are by reference incorporated into and made a part of this count.

Before the date of April 4, 1946, by authority of the House of Representatives the defendants and each of them were summoned to produce before the Congressional Committee on April 4, 1946, records and papers upon the matter under inquiry, that is to say, all books, ledgers, records and papers relating to the receipt and disbursement of money by or on account of the Joint Anti-Fascist Refugee Committee or any subsidiary or subcommittee thereof, together with all correspondence and memoranda of communications by any means whatsoever with persons in foreign countries for the period from January 1, 1945, to March 29, 1946.

In response to these subpoenas each and all of the defendants appeared before the Congressional Committee in the City of Washington, District of Columbia, on 517 April 4, 1946, but failed to produce the records called for in the subpoenas, as they had power to do, and thereby wilfully made default.

George Morris Fay
Attorney of the United States in
and for the District of Columbia.

A TRUE BILL:

Helen M. Hoffman
Foreman

518 DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF
COLUMBIA

TUESDAY, APRIL 6, 1948

The Court resumes its session pursuant to adjournment:
Hon. Richmond B. Keech, presiding.

United States vs. Ernestina G. Fleischman
Criminal No. 368-47

Charged with
Vio. Sec. 88, Title 18, U. S. Code and Vio. Sec. 192, Title
2, U. S. Code.

Come again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid, in this cause, the hearing of which was respite yesterday; whereupon after argument of counsel and charge of the Court, alternate juror Grace Haley, is discharged from further service in this case; and thereupon the said jury upon their oath say that the defendant is guilty in manner and form as charged in Count Two of the indictment; whereupon each and every member of the jury is asked if that is his verdict and each and every member thereof says that the defendant is guilty in manner and form as charged in Count Two of the indictment and thereupon the defendant is permitted to remain on bond pending sentence; whereupon the case is referred to the Probation Officer of the Court.

519 DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF
COLUMBIA

WEDNESDAY, APRIL 28, 1948

The Court resumes its session pursuant to adjournment:
Hon. Richmond B. Keech, presiding.

• • •
United States vs. Ernestina G. Fleischman
Criminal No. 368-47

Charged with
Vio. Sec. 88, Title 18, U. S. Code and Vio. Sec.
192, Title 2, U. S. Code.

Come as well the Attorney of the United States as the defendant in proper person, according to his recognizance; and by his attorneys, Messrs. O. John Rogge, Benedict Wolf and Robert H. Goldman; and thereupon the defendant's motion for judgment of acquittal or new trial, coming on to be heard, after argument by the Counsel, is by the

Court denied; and thereupon it is demanded of the defendant what further she has to say why the sentence of the law should not be pronounced against her and she says nothing except as she has already said; whereupon it is considered by the Court that, for her said offense, the said defendant be committed to the custody of the Attorney General or her authorized representative for imprisonment for a period of Three (3) months and to pay a fine of Five Hundred (\$500.00) Dollars; and thereupon the Court fixed the amount of bond in this case at One Thousand (\$1000.00) Dollars pending appeal.

520 Filed Apr 29 1948 Harry M. Hull, Clerk

Notice of Appeal

Name and address of appellant

Ernestina G. Fleischman, 19 East 65th Street, New York.

Name and address of appellant's attorneys

O. John Rogge, Esq., 401 Broadway, New York, N. Y.
and

1700 Eye Street, N. W., Washington, D. C.

Wolf, Popper, Ross & Wolf

160 Broadway, New York, N. Y.

and

902 20th Street, N. W., Washington, D. C.

Offense

Violation of Title 2, U. S. C., Section 192

Concise statement of judgment or order, giving date, and
any sentence

Verdict of guilty as charged—April 6, 1948,
\$500.00 fine and sentence of 3 months
date, April 28, 1948

Name of institution where now confined, if not on bail

Appellant on bail.

I, the above-named appellant, hereby appeal to the

United States Court of Appeals for the District of Columbia from the above-stated judgment.

Ernestina G. Fleischman

Ernestina G. Fleischman

O. John Rogge

O. John Rogge

By: Benedict Wolf

Wolf, Popper, Ross & Wolf

April 28, 1948

B United States Court of Appeals for the
District of Columbia Filed Apr 29, 1948

Joseph W. Stewart, Clerk

**FORM OF CLERK'S STATEMENT OF DOCKET
ENTRIES TO BE FORWARDED UNDER**

RULE IV

(To accompany duplicate notice of appeal to the United
States Circuit Court of Appeals)

District Court of the United States for the District of
Columbia

United States of America vs. Ernestina G. Fleischman
Criminal No. 368-47

1. Indictment for Vio. Sec. 88, Title 18, U. S. Code and
Vio. Sec. 192, Title 2, U. S. Code filed March 31, 1947.

2. Arraignment March 23, 1948

3. Plea to indictment Plea Not Guilty on Count Two
March 23, 1948

4. Motion to withdraw plea of guilty denied

5. Trial by jury, March 23, 1948

6. Verdict or finding of guilt Guilty on Count Two

April 6, 1948

7. Judgment—(with terms of sentence) Three (3)
months and to pay a fine of Five Hundred Dollars
(\$500.00) entered April 28, 1948

(Keech, J.)

8. Notice of appeal filed April 28, 1948
 Date April 29, 1948

Attest Harry M. Hull, Clerk
 By Helen M. McIntosh
 Deputy Clerk

N. B.—This statement from the docket entries is intended suitably to identify the case and not as a substitute for the record on appeal, which is to be prepared and certified as provided in rules VII, VIII, and IX.

1

Washington, D. C.,
 Tuesday 23 March 1948.

The above-entitled matter came on for hearing before the HON. RICHMOND B. KEECH, Associate Justice, and a jury at 11:35 o'clock, a. m.

APPEARANCES:

On behalf of the United States:

CHARLES B. MURRAY, Esq.,
 Assistant United States Attorney.

On behalf of the defendant:

O. JOHN ROGGE, Esq.,
 ROBERT H. GOLDMAN, Esq., and
 BENEDICT WOLF, Esq.

2

Proceedings

THE CLERK: The case of Ernestina G. Fleischman.

MR. MURRAY: The Government is ready.

MR. ROGGE: Defendant is ready.

MR. MURRAY: If the Court please, there are two counts to this indictment, and the Government would like to move to dismiss the first count, as to this particular defendant. It has already been disposed of as to the others in a previous proceeding, with which Your Honor is familiar.

THE COURT: Very well, sir.

MR. ROGGE: I waive the reading of the indictment, if the Court please.

There has been no arraignment, as yet.

THE COURT: After this is done—

MR. ROGGE: May I come to the bench?

THE COURT: After this is done, yes.

All right, Mr. Morgan.

THE CLERK: Ernestina G. Fleishman, in Case No. 368-47, in which—

MR. MURRAY: Count 2 remains. Count 1 is out.

THE CLERK: In 368-47, in which you are charged with violation of Section 88, Title 18, United States Code—

MR. MURRAY: That was abandoned, pardon me.

THE CLERK: In which you are charged with a violation of Section 192, Title 2 of the United States Code, Count 2 of the indictment,—how do you wish to plead?

3 THE DEFENDANT: Not guilty.

THE COURT: If you gentlemen will come to the bench, please.

(Thereupon, counsel approached the bench and the following proceedings were had without the hearing of those in the courtroom.)

THE COURT: In connection with the selection of the jury, gentlemen, have you gentlemen prepared the questions, or—

MR. ROGGE: Yes.

THE COURT: May I ask if your questions are the same as they were before?

MR. ROGGE: We have some new ones, Judge, although I now recall that our old list is in here, and Your Honor ruled on it.

THE COURT: Is it in here (indicating document?)

MR. ROGGE: I am pretty sure we filed it.

THE COURT: I thought it would be much easier if we got together and knew what we were saying, and ruled on the questions here, and we would save trouble.

MR. ROGGE: I might say that since the arraignment, all the pleadings we filed contained "except Ernestina G.

Fleischman;" and I shall want to make a motion to dismiss on her behalf. I know you can rule on it immediately, but for the sake of the record, I will make clear that there was a motion for change of venue.

I want to be sure, for record purposes, I covered that.

4 THE COURT: Are you under the impression they are in here?

MR. WOLF: They were submitted to you.

THE COURT: I remember they were submitted to me, yes.

MR. MURRAY: Could it be possible that they went up with the record, on appeal?

MR. WOLF: They are not in the printed record.

MR. ROGGE: We have no new set.

THE COURT: I think it would be much better for us to be consistent. I don't want to do one thing in one case, and one thing in another.

You do not have a copy of what you had?

MR. ROGGE: I thought I had a copy with me, and, to tell you the truth, I didn't. That is why we made up a new set.

THE COURT: I have got it.

Do you have your copy?

MR. MURRAY: I don't have it available. I probably have it in my files upstairs.

THE COURT: Let me suggest this to you—

MR. ROGGE: Some of these motions I want to mention.

I want to argue a motion to exclude Government witnesses from the panel.

MR. MURRAY: Employees?

MR. ROGGE: Employees, yes, from the panel.

Maybe you would want to take these things up now?

5 THE COURT: Before you leave this, will you give me a copy of the questions you have?

MR. ROGGE: Yes, sir.

THE COURT: Do you have a set of questions, Mr. Murray?

MR. MURRAY: I don't have one, no, sir.

MR. ROGGE: I may say, I telephoned the office, Judge, when I found out I didn't have my set, and they tell me they could not find that set either, so we were forced, last night, to prepare another one.

THE COURT: I am sorry.

I think I have one upstairs,—it may be in here.

MR. ROGGE: I looked in the printed volume, too and I was surprised we didn't have it in the printed record, but I was on vacation when that was prepared, and I think you were too, Mr. Murray.

MR. MURRAY: I was too, yes.

This is the new list, is it (referring to paperwriting)?

MR. ROGGE: That is the new list made up last night.

THE COURT: May I ask you, sir, if you could show me what is new—or, do you remember?

MR. WOLF: It would be hard to tell.

THE COURT: All right, sir.

I will see if I cannot get my original copy.

MR. ROGGE: It would be agreeable to have Your Honor work from the original list.

6 THE COURT: If I can find it.

MR. ROGGE: If you can find it!

THE COURT: Yes. I wouldn't like to say.

And, this constitutes the questions you want to ask?

If you want to make an argument on these various motions, I wonder if it would be well to exclude the jury at this time?

MR. ROGGE: I would like to have them excluded.

THE COURT: How long do you think it will take?

MR. ROGGE: These formal matters, not formal, but the questions that have already been passed upon, I am going to be very brief. I am going to enumerate them.

THE COURT: All right.

MR. ROGGE: The motion to exclude Government employees from the jury panel, I would like to take about ten or fifteen minutes on.

THE COURT: I am trying to compute the time. That, plus the time I get these and mark them, will probably make it half-past—

MR. MURRAY: Yes, sir.

THE COURT: We will excuse them until after lunch.

MR. ROGGE: That is agreeable, yes.

(Thereupon, counsel returned to their places at the trial table and the following proceedings were had in open court.)

THE CLERK: All jurors will be excused until 1:30.

Report back to this courtroom at that time.

7 (All jurors then left the courtroom as directed.)

THE COURT: All right, gentlemen.

Do you want to proceed, Mr. Rogge?

MR. ROGGE: Yes, if the Court please.

THE COURT: Let me interrupt, before you start.

There was some talk about possible consolidation. I take it now that we are proceeding with the one case?

MR. MURRAY: Right.

MR. ROGGE: Right. I have had that up with my client.

THE COURT: You need not explain.

MR. ROGGE: There was also another question I wanted to mention to Your Honor.

I think that Mr. Murray and myself and Mr. Goldman, in conference, can agree—I am not definitely committing my client as yet—but I think we can agree to stipulate the evidence with reference to pertinency. We haven't as yet, come to the conclusion, but I think we can.

As to the consolidation, the defendant is opposed to that.

Your Honor will recall that this was an indictment against 17 people all told, and went to trial as to 16. At that time Mrs. Fleischman was in France, and I did not

represent her, so all the pleadings were drawn with the exception "except Ernestina G. Fleischman."

I now wish to make on her behalf the motion to dismiss that was made on the behalf of the others, including 8 all the points that were there made, and I, of course, shall not argue them, but I will illustrate what they were:

One was that the indictment did not state an offense against the United States, and that the resolution setting up the House Committee was unConstitutional, that it violated the Ninth and Tenth Amendments that it had to be read in connection with Section 192 for the purposes of this case, and therefore was a criminal statute and didn't provide an ascertainable standard of guilt and therefore was in violation of the Fifth and Sixth Amendments; That it did not state an offense against the United States because the House Resolution was so vague and indefinite as to permit punishment of the fair use of freedom of expression in violation of the First Amendment and we have a fuller statement in the points, I think we make, all told, some eight points, or more; and I wanted to make them as to this defendant but I don't want to argue them, except that I want to point our that Your Honor is aware that there has been a decision of the Court of Appeals, it came down within the last week, a two-to-one decision, and I suppose I need not emphasize that every point that I think is in the decisions of Holmes and Brandeis is one of Judge Edgerton's. As a matter of fact, I think the majority opinion was talking about a case other than this case, and we are going to point that out in a petition for re-hearing.

9 Your Honor will recall how careful we were to keep any talk of Communism away from the jury, and yet the way the majority opinion was written looks like they are talking about the case of the Hollywood Ten, rather than this case.

They state, for instance:

"We think that even if the inquiry here had been such as to elicit the answer that the witness was a believer in Communism, or a member of the Communist Party, Congress had the power to make the inquiry."

No such issue was involved in our case. Our case was whether certain books and records were pertinent to an inquiry and what the resolution calls "un-American" or "subversive propaganda" so we are going to submit a petition for re-hearing to the Court of Appeals, saying that they are talking about another case than the case before them; and we are going to submit to them that if they really are talking about this case, they should follow the opinion of Mr. Justice Edgerton for all of it.

I have been very brief, if the Court please.

For all the stated reasons in the motions to dismiss that are on file on behalf of the other defendants, I now orally want to make those on behalf of Mrs. Fleischman.

While I am at it, I might also say there is another motion. We had a motion for change of venue; a motion for a bill of particulars I shall not insist on, but I 10 do want to make on her behalf all the points in the motion to dismiss and also the point that was raised in the motion for change of venue.

THE COURT: Do you have anything you would like to say, Mr. Murray?

MR. MURRAY: No, Your Honor.

THE COURT: I take it, Mr. Rogge, that your purpose is to preserve your points in this case that you made in the original case as to the other 16?

MR. ROGGE: That is my primary purpose, Judge; but while I was fulfilling that purpose, I couldn't, since it is right on the point we are discussing, I couldn't also help pointing out that I thought that the majority opinion in the Court of Appeals is talking about some other case than the Barsky case, and the one I liked was the dissenting opinion, so I went beyond my purpose of making the point.

I also wanted to tell Your Honor what I thought of that decision; but the primary purpose is to have the record so that all the points we have made on behalf of the 16, except the one with reference to a bill of particulars, I am also making on behalf of this defendant.

THE COURT: Mr. Murray, have you seen one of these statements of questions on the voir dire?

MR. MURRAY: Yes, Your Honor, I have read the questions.

THE COURT: You have read them. Are you in 11 a position now to indicate which ones, if any, you take exceptions to?

MR. MURRAY: I have noted in a column here, exceptions to only two of them, 27 and 28.

THE COURT: What did you say? 47?

MR. MURRAY: 27 and 28, on page 3.

THE COURT: All right.

Did I understand you correctly? Those are the only two at this time that you take exception to?

MR. MURRAY: Yes, sir.

THE COURT: I am to understand, so far as you are concerned, you have no objection to the other questions?

MR. MURRAY: That is my present position. It is possible that something will turn up that will cause me to ask the Court to listen to me further.

THE COURT: I am trying to save time here.

MR. MURRAY: Yes, sir.

MR. ROGGE: I might say this, Judge; If Your Honor should find, or we should find, over the noon recess, this old list, if might be—I have a recollection of one or two questions that are on there that are not on here that I like, but one's recollection has to operate as well as it can,—

THE COURT: If you find it, or I find it, I will certainly give you the same rights here as I did in the other one.

MR. ROGGE: Thank you.

THE COURT: I am wondering: doesn't the record reflect the questions permitted?

12 MR. ROGGE: The transcript could.

MR. MURRAY: I have the transcript.

MR. ROGGE: Your copy was filed too.

MR. MURRAY: I have a copy. I don't know where I got it. It may be the Clerk's copy.

MR. WOLF: I think the transcript would reflect those questions permitted by the Court, but would not reflect those which the Court disallowed.

MR. ROGGE: Yes, the transcript would reflect the ones your Honor allowed.

THE COURT: I don't think I had the transcript.

MR. MURRAY: I have it in my office right now.

THE COURT: All right, sir. Suppose we go ahead as far as we can, and then when we recess, I will take this, plus the transcript, if you will send it around to me, so we will have it.

MR. MURRAY: Yes, sir; I'll do that.

THE COURT: You said that you had one other matter, Mr. Rogge.

MR. ROGGE: Yes, sir. I want to argue, and I am doing this more than just to preserve the record, I am doing this because I think Your Honor has ruled in the defendant's favor, at that time,—and that is a motion to exclude all Government employees who are on the jury panel; and I call Your Honor's attention to the fact 13 that in the trial of the 16 it just so happened, I don't remember now quite what the circumstances were, leading up to it, but we had a list of civil jurors, and there were no Government employees on that particular list.

Now, I am asking for the same result, deliberately, that we reached by a combination of circumstances at that time, when we were on trial as to the 16.

We don't question the rule of law that was laid down by the Supreme Court in U. S. against Wood, and which is the basis for having Government employees on jury panels in criminal cases.

I do want to call Your Honor's attention, however, to some language in that case, and that is this—

THE COURT: Do you have the page?

MR. ROGGE: Page 150.

"It is suggested that an employee of the Government may be apprehensive of the termination of his employment in cases decided in favor of the accused in a criminal case, unless the suggestion be taken to have reference to some special and exceptional case."

And I am going to say that is what we have here.

"It seems to us far-fetched and chimerical."

What was the situation in the Wood case? There, the crime was petit larceny from a private corporation; and even there, I may say, the decision was 5-to-3, and 14 was reversing the decision of the Court of Appeals; but what you have the Supreme Court saying, by a divided court, was that in an ordinary criminal case, simply because the Government is the prosecutor, that is not enough to disqualify a juror from jury service, or from serving on that case, but the Supreme Court makes reference to special and exceptional circumstances and I am going to submit to Your Honor that they apply in this case because in this case you don't have the ordinary case, you don't have a case like the one that just preceded us here, where a person is accused of larceny from some private corporation or individual, and the Government is simply here as a prosecutor in that case.

In this case the Government is, in here, a party in interest. We are in here under Section 192, and unlike the Wood case, the Government is involved more than as a prosecutor.

Here, you have Congress, itself, who has in effect initiated the proceedings by sending over to the District Attorney the document which initiated the proceeding. So, you have the Government in this case more than simply a prosecutor; and even though in this case Your Honor is going to be more careful than the Court of Appeals, and is

going to follow the line which Your Honor followed in the previous trial, to keep the word "Communism" from the jury so that we can't have prejudice,—Your Honor can't

keep from the jury words like "subversive" or "un-

15 American" or "House Committee on Un-American Activities." They are going to be involved, in the nature of this case,—they are the very substance of the prosecution.

Now, when you add, on top of that, the fact that on March 21, 1947 President Truman came out with this Loyalty Order, which began like this:

"Whereas, each employee of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States—"

and then prescribes a sweeping program of investigation which I will say to Your Honor I have characterized in a harsh way, at times, because that is the way I feel about it, I think it is in the direction of taking away the characteristics of our freedom, but apart from that, paragraph 3 recites:

"An investigation shall be made of all applicants, and all available and pertinent sources of * * * * and should include reference—"

note this:

"—to the House Committee on Un-American Activities."

In other words, part of the order is made the minimum requirement for the investigation of all existing employees, and part of that investigation includes reference to the House Committee on Un-American Activities.

Employees of the Government therefore have a
16 very real stake in this proceeding.

Now, I ask whether it is far-fetched, in this connection, for an employee to wonder if perhaps his name might not get in to the files of the House Committee on Un-American Activities? They, themselves, have stated that they had a card index, or a black list of a million names.

Isn't that a "special and exceptional circumstance?"

How can a Government employee, if called, as a juror in this case,—how can he sit there and not say, in the back of his mind: "I'd better reach a guilty verdict here; for, if I don't, not only the Government but the House Committee is going to know about this, so I must reach a result of holding him guilty, otherwise I'm going to be suspect."

Over and beyond that, there is still another circumstance.

I have on file here, it is true, a suit to have the Attorney General's alleged subversive list held unconstitutional. I think it is unconstitutional, but nevertheless it is there and the Attorney General, in an ex parte, and what I regard as an UnAmerican and UnConstitutional proceeding, or procedure, without any hearing, has designated a group of some 90 organizations, including the Joint Anti-Fascist Refugee Committee, as subversives.

This defendant is a member of the executive board of that organization, and that organization's name, likewise, cannot be kept out of this proceeding, so you have 17 not only the House Committee on Un-American Activities, you have the Attorney General's office, itself, which has designated the Joint Anti-Fascist Refugee Committee as subversive, and how does that prospective juror know, if he finds a verdict of "Not Guilty," how does he know but what maybe in that circumstance his name is going to be on still another list?

I am not talking here, as the Supreme Court mentioned in the Wood case, about an unfounded fear. This is a very real fear. This is one that you can really see, one that you can put your finger on, Judge, and it might occur to Your Honor, though—we can ask these people "Are you afraid of this?"

Well, it is a great reflection to admit that you are afraid. It takes courage to stand up and say "Yes, I'd be afraid." A juror isn't going to do that. That requires even more courage than to find a verdict under such circumstances, if that were the juror's conclusion, of "Not Guilty," be-

cause who is there among us that likes to stand up and say he is afraid. He might be, but he is not going to admit it.

Under all those circumstances I call Your Honor's attention to the language of the Supreme Court in the Crawford case, Crawford against the United States, 212 U. S. 183, where the Supreme Court said, page 183:

“Bias or prejudice is such an elusive condition of the mind that it is difficult, if not impossible, to always recognize its existence, and it might exist in the mind of 18 one on account of his relation with one of the parties who was quite positive that he had no bias and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence, but he isn't going to be able to do that.”

You have a great loyalty investigation going on, Judge. These people,—and I have been in some of these loyalty hearings,—they don't get to know the nature of the charges against them. In the loyalty hearings they don't know who their accusers are. They just suddenly find they are discharged from Government employment, and frankly I have found something that amounts to a little bit akin to terror and hysteria among Government employees. I mean, these people have been asked, on various occasions,—the last case I was in, they wanted to know what the suspended employee meant by going to the Stanley Theater, that is a public theater in New York City,—going to the Stanley Theater and seeing a movie called “Stone Flower.”

I mean, we are no longer a free people in this country. I have seen this thing, in an insidious way, gradually growing on us. We have become the kind of people, if Your Honor please, described in a couple of sentences in Sinclair Lewis' book, “It Can't Happen Here.” “On the trains, in theaters, on the street, men looked about to see who might be listening.”

19 That is the way it became with these Government employees with this large loyalty investigation, pursuant to that Loyalty Order, by the Government of all its 2 million or so employees; and I say that under those circumstances a Government employee can't help but have, in the back of his mind, a fear of what will happen to him, a fear for his security, if he comes out with any other verdict than one of guilty.

So because, as I say, those are special and unusual circumstances, and also in view of the fact that as a result of other circumstances, all Government employees were, as a matter of fact, excluded from the trial of the 16 other defendants in this case, I therefore ask Your Honor, in view of the exception which is to be found even in the majority opinion in the Wood case, that Your Honor exclude all Government employees from the jury panel who are selected for the trial of the defendant.

THE COURT: Mr. Murray, do you have anything to say?

MR. MURRAY: I will be very brief, if the Court please.

I am personally indifferent as to whether the members of this jury to try this case be employees of the Government or not.

I suggest that it would be a bad precedent to exclude, in the beginning of a trial, all persons who happen to have a connection with the Government. I notice in the list of questions proposed to be put to jurors, which I do not object to, are many questions directed at Government employees: "Have you been questioned as to loyalty by any organization?" And "Have you had any discussion with other Government employees concerning subversive activities?" And such things as that.

I suggest that the matter could be handled in a practical manner. It so happens that before this trial began I was engaged in the trial of a similar case, and it was surprising how few people belonged to the Government, and of those

that had had any contact with the activities of the loyalty boards and subsidiaries and other agencies; and while, as I say, I am indifferent to the thing, I would not like to see a precedent established of a Court finding from the very fact of that Government employment, a presumption of disqualification.

I think perhaps a practical application of the precautionary measures against disqualification could be made as to each individual juror,—

MR. ROGGE: I have but two comments—

Excuse me.

MR. MURRAY: I had finished.

MR. ROGGE: I have but two comments:

As to the setting of a precedent, I am not asking the Court to hold that Government employees cannot sit in ordinary cases, but I am asking Your Honor to hold that in a case where the one who really originated the proceeding was the House Committee on Un-American Activities, and where the organization involved is one that 21 is on the Attorney General's list, that in a group of cases—and I hope they don't become many—but in that group of cases, the Court excludes Government employees.

It is true that in preparing a list of questions, I have had to prepare it both ways. I couldn't do otherwise and be fully prepared. I came in here to argue this point, and I hope Your Honor rules in my favor, and then what we can do is strike out certain questions from the list of questions, but I had to prepare extra questions so I would be ready for all.

THE COURT: The Court of Appeals just said, in the Romney case, as I recall, Mr. Rogge, that the fact that there were a number of Government jurors on there was no prejudice.

MR. ROGGE: I will have to say that I am not familiar with that.

THE COURT: It was just handed down yesterday or the day before.

MR. ROGGE: I haven't read it.

THE COURT: What I was thinking about was that there you have a man who was Sergeant-at-Arms at the Capitol, and the prosecuting authority was by the Congress, itself.

Isn't that almost analogous to the situation you have here?

MR. ROGGE: I will concede, in the case of Romney, who is alleged to have misappropriated funds of one of the Houses of Congress that you would have a situation 22 that is close to the case we have here,—Yes, Judge, maybe we have.

Certainly my associate with whom I have discussed this will have to admit that the Romney case is not quite like the Wood case; that the Government has a greater interest,—has an interest in addition to an interest as prosecutor, in the Romney case, under the facts as I understand them but my associates point out this, and I do think it is valid, Judge: that in the Romney case there was no talk about "subversive" or "un-American" and there certainly is in this type of case; and I can also add, from my own standpoint, that this business of being called "subversive" or "un-American" or being in any way connected with it has made us a people afraid, and although the Romney case would be in the direction of this situation, I still say that the circumstances in this case, and I know them from personal experience, is such that I am sure that a Government employee, even if he felt the defendant not guilty, would think twice before he rendered such a verdict, because he would be afraid. I mean, you really have questions of loyalty and patriotism. You have got to realize the exceptional circumstances which constituted the exception in the Wood case.

THE COURT: Then, gentlemen, we have gone as far as we can go at this point. I will take your questions, and Mr. Murray, will you see that someone sends me around a copy of the transcript of the record.

23 MR. MURRAY: Yes, sir.

THE COURT: Or, I will put it this way to you gentlemen:

Would it be practical for you gentlemen to go over it and pull the questions that you want? I will say, as I did before, as to those questions,—that it may save more time if you two do it together.

MR. ROGGE: Why don't we do this:

Why don't we go through and pick out the questions,—could we impose on your secretary enough so that she would make a copy and hand them up to the Court?

MR. MURRAY: I think so.

MR. ROGGE: We'll do that now.

THE COURT: I think we will be safer and fairer. What you want to do, Mr. Rogge, so far as the circumstances permit, is to follow the previous case, because my understanding, from you gentlemen, and from what I have known,—is, Mrs. Fleischman is in identical situation with the others!

MR. ROGGE: I am going to argue—

THE COURT: At least for her protection,—put it that way.

(Thereupon, the Court took under consideration certain other matters, at the conclusion of which it stood in recess until 1:45 o'clock p. m., that same day.)

24

Afternoon Session

[Following the taking of the usual luncheon recess, the hearing in the above-entitled matter was resumed at 1:45 o'clock p. m.]

THE COURT: All right, gentlemen.

[Thereupon, counsel approached the bench and the following proceedings were had without the hearing of those in the jury:]

MR. ROGGE: We found the old list.

THE COURT: I did, too.

MR. ROGGE: Now, the old list, since you have them

there, we would like in addition to the questions we have asked, we would like these additional numbers, but I think we had better ask before, or we are not covered.

MR. WOLF: In addition to the questions on our present list, we would like those questions from the old list.

THE COURT: You have seen these, Mr. Murray?

MR. MURRAY: Yes, sir. I have seen them all.

THE COURT: We granted ten, the last time.

MR. ROGGE: Of the ones you granted before, we selected this number.

THE COURT: All right.

Do you have any objection to those?

MR. MURRAY: No, your Honor.

THE COURT: These additional ones, to the
25 ones we asked in the previous case?

MR. MURRAY: No, I have no objection.

MR. ROGGE: I changed my mind about one of the old ones, Judge, that is number 18 on there.

THE COURT: On here, sir?

MR. ROGGE: Yes, and I will tell you why.

THE COURT: You want it out?

MR. ROGGE: Yes.

THE COURT: That is 18.

MR. ROGGE: I am going to try to keep out, and that of course will depend upon the course of the trial, but after discussion with my associates, we are going to try to keep out any reference to the former trial, former conviction of any of these defendants because we think that will be prejudicial error in this case and for that reason I do not want any reference in our questions to Dr. Barsky or Dr.—Dr. Edward J. Barsky or any of the other defendants.

My reason for changing my mind about it—

MR. MURRAY: I think I should say, in frankness, that I expect to contend that the Government can show the actions of the co-defendants in trying this particular defendant, because she is charged as an aider and abettor of the others.

MR. ROGGE: She is not charged with being an aider and abetter. I know the theory came in. It is not mentioned in the pleadings. I think probably the pleadings do not have to mention it. I am going to argue that when it comes up on the question of relevancy.

26 MR. MURRAY: I thought I should mention that possible dispute between us at this time.

THE COURT: Yes, I understand.

In any event, as of this time, the only thing you are saying to me is, you do not desire that I ask 18.

MR. ROGGE: Yes.

THE COURT: Mr. Murray, have you any other objection or statement to make with reference to the first sheet which was given to me this morning?

MR. MURRAY: No, I have no objection.

THE COURT: You mentioned 27 and 28.

MR. MURRAY: Yes, sir.

THE COURT: I think when we made use of the Congressional Record before, we eliminated anything which dealt with the question of naturalized citizens, did that for the reason that there might be some possibility of some inference being drawn from it.

You questioned 27 here, namely, "What is your feeling about persons born and raised abroad, coming to this country and becoming citizens?"

You mean by that what Mr. Rogge—

27 MR. MURRAY: May I say that really my objection was to the form of that question, asking the juror to state his feeling one way or the other.

MR. ROGGE: I know that in the previous trial your Honor tried to keep this out. We may be successful in keeping this out of this trial, too, but again, out of caution, we are trying to cover all possibilities. That is the reason for putting it in.

THE COURT: He has objected to the form.

What is your feeling? What you have in mind, is it not,

"Would you, by virtue of the fact that a person has come to this country and become a citizen, be prejudiced in any way?"

MR. MURRAY: I wouldn't object to that.

MR. ROGGE: Suppose we amend it.

THE COURT: We will say, so we will know what: "Have you any prejudice against foreign born," instead of "What is your feeling," and "Have you any prejudice?"

MR. ROGGE: That is all right.

THE COURT: Have you any prejudice against any foreign born persons who have become a citizen?

MR. ROGGE: Right.

MR. WOLF: Would you say there: "foreign born persons," as a class?

THE COURT: Sure. "Who have become,—" Then it would be—

MR. WOLF: Yes, sir.

THE COURT: "Become citizens of this country?"

28 In other words: "Have you any prejudice against foreign born persons who have become citizens of this country?"

MR. ROGGE: Right.

THE COURT: I don't know what relation this 28 is, here. Are you concerned with that in any particular way?

MR. ROGGE: I will say it is the type of question I supposed your Honor ruled on adversely when we tried it before, and there is the idea that somewhere in this case it is going to be brought out that the organization involved, is the Joint Anti-Fascist Refugee Committee, which provided relief for the Anti-Fascist Refugees of Franco's Spain. Maybe that can be kept out. Certainly the Joint Anti-Fascist Refugee Committee is going to be mentioned.

MR. GOLDMAN: I understand Mr. Murray's objection was as to form.

MR. MURRAY: May I look at that?

THE COURT: 28!

MR. MURRAY: I don't have my copy.

THE COURT: Surely, here it is. [passing the document to counsel.]

MR. MURRAY: That really went to the form, also, except I think we succeeded fairly well in keeping that element out of the previous trial, and could do so again. As to that, however, I won't attempt to tell counsel what to do, but if it were amended to say "Have you prejudice—"

MR. ROGGE: That is agreeable.

29 MR. MURRAY: Instead of being "What is your feeling—"

MR. ROGGE: That is agreeable.

THE COURT: What is that now?

MR. ROGGE: "Have you any prejudice against Spanish Republicans—"

THE COURT: Period. "Have you any prejudice any Spanish Republicans!"

MR. WOLF: Do you want the rest of the question in?

MR. ROGGE: I think I would rather keep the rest of it, Judge, after that.

THE COURT: Do you have any objection to that?

MR. MURRAY: No, your Honor.

THE COURT: "Have you any prejudice against Spanish Republicans who fought against Franco and are not refugees in France or Mexico?"

MR. ROGGE: That is agreeable.

THE COURT: Do you have any objection?

MR. MURRAY: I have not, now.

MR. ROGGE: One other matter:

I moved the admission during the previous trial of Mr. Wolf and Mr. Goldman. I raise the question as to whether that goes as to this trial, too. It is a different trial under the same indictment.

THE COURT: Any objection?

MR. MURRAY: Sorry!

30 THE COURT: Mr. Goldman and Mr. Wolf being admitted?

MR. MURRAY: None whatever, your Honor.

THE COURT: Very well.

Now, let's see, gentlemen: You raise no question as to this question: "Has any member of the panel listened to the radio broadcasts of Henry F. Taylor or Fulton Lewis, Jr.?"

You mean, if I had ever listened to that, I couldn't sit in this case?

MR. ROGGE: It might be the basis for either further inquiry or peremptory challenge.

THE COURT: Aren't we going to get into something we don't want? I am just calling it to your attention, where we may go on it.

MR. ROGGE: I will say this, Judge: If you see we are going too far afield, wasting time, we can change it during the course—

THE COURT: I don't want to waste time, of course; but what I was more concerned with, was whether we would start opening up the bottle of olives.

MR. ROGGE: I don't think so.

THE COURT: I am being very honest. I don't know enough about it to pass on it.

MR. ROGGE: As a matter of fact, I thought you held us down a little too much. It is a question, of course, but

31 I thought you held us down too much at the time and it might very well be the basis of a peremptory challenge.

THE COURT: Then, we'll answer this question yes or no, and if we get anything further, we will come to the bench.

MR. ROGGE: That is agreeable.

MR. MURRAY: I might say that Mr. Rogge has taken to the air, and it won't be out of order to ask if they have heard him.

THE COURT: Just a minute, is this going to come out?

MR. ROGGE: About the House Un-American Activities?

THE COURT: Yes.

MR. ROGGE: Yes.

THE COURT: The defendant has criticized it.

MR. ROGGE: The defendant in one sense has done more than that; according to the Government, she refused to turn over books and records to the Committee, so in one sense she has done more than criticize.

THE COURT: You want it?

MR. ROGGE: Yes.

THE COURT: All right.

I understand we have covered what you have in mind.

MR. MURRAY: Yes.

THE COURT: Let me ask you: What are you going to ask, Mr. Murray?

MR. MURRAY: I have not prepared any written questions, if the Court please. A reading of the questions suggested by the defense, I believe they will excite the type of inquiry I had in mind.

The only thing I had in mind was—

THE COURT: I am not asking for him, don't misunderstand.

MR. MURRAY: No. The only thing I had in mind was to ask the members of the jury if they belonged to, or ever have belonged to any organization devoted to attempting to influence public opinion on political questions.

MR. ROGGE: That question—

THE COURT: We have there a question that asks what organization do you belong to.

MR. MURRAY: That ought to cover it.

So, in view of that I have no additions to suggest.

THE COURT: All you will have will be to identify the case?

MR. MURRAY: Yes, sir.

THE COURT: And from that point on, I will proceed with the questions which you gentlemen have submitted.

MR. ROGGE: And we have a pending motion.

THE COURT: I am going to come to that. I am going to deny the motion, sir, excluding them. I have read your questions which relate to Government employees. If we get something which is specific or indicates that there may be bias or prejudice, we will deal with it then.

MR. ROGGE: We don't need an exception, but I can note one.

[Thereupon, counsel returned to the trial table
33 and the following proceedings were had in open court:]

THE CLERK: All jurors rise and raise your right hand.

[Thereupon, the prospective jurors were duly sworn on their voir dire examination.]

Examination of Prospective Jurors on Voir Dire

THE COURT: Suppose we draw the twelve, first.

THE CLERK: Jurors please answer as your name is called and take a seat in the jury box:

Regina C. Buckley.

MRS. BUCKLEY: Here.

THE MARSHAL: Take seat No. 1.

THE CLERK: George F. Comer.

MR. COMER: Here.

THE MARSHAL: No. 2.

THE CLERK: Mrs. Lizzie A. Haley.

MRS. HALEY: Here.

THE MARSHAL: No. 3.

THE CLERK: Merritt Swift.

MR. SWIFT: Here.

THE MARSHAL: No. 4.

THE CLERK: John J. Anderson.

MR. ANDERSON: Here.

THE MARSHAL: No. 5.

THE CLERK: Samuel C. Berk.

MR. BERK: Here.

34 THE MARSHAL: No. 6.

THE CLERK: Mrs. Cecil A. Isaacs.

MRS. ISAACS: Here.

THE MARSHAL: No. 7.

THE CLERK: Forest E. Parler.

MR. PARKER: Here.

THE MARSHAL: No. 8.

THE CLERK: Reginald Parker.

MR. PARKER: Here.

THE MARSHAL: No. 9.

THE CLERK: Jesse R. Price.

MR. PRICE: Here.

THE MARSHAL: No. 10.

THE CLERK: Eulis T. Saunders.

MR. SAUNDERS: Here.

THE MARSHAL: No. 11.

THE CLERK: Walton E. Shipley.

MR. SHIPLEY: Here.

THE MARSHAL: No. 12.

[Those named took the appropriate seats in the jury box.]

THE COURT: You may identify the case, Mr. Murray; and, will you speak loud enough for all prospective jurors in the room to hear?

MR. MURRAY: Yes, sir.

If your Honor please, and members of the jury in
35 the box, and members of the panel, my name is
Charles B. Murray. I am Assistant United States
Attorney, one of the assistants to Mr. George Morris Fay,
who is the United States Attorney.

I am about to state certain facts about the case which is
to be tried, so that you will be able to answer questions
which the Court will give to you, as to whether you know

anything about the case or anything about individuals connected with the case about to be tried, which is the case of the United States versus Ernestina G. Fleischman, who is seated here (indicating the defendant.)

Mrs. Fleischman is charged with what is commonly called contempt of Congress, it being alleged that on a certain day, April 4th, 1946, she appeared before the House Committee on Un-American Activities and having been summoned to produce records before them, refused to do so.

Mrs. Fleischman is represented by Mr. O. John Rogge, Mr. Benedict Wolf and Mr. Robert H. Goldman (indicating defense counsel.)

The records which she was called upon to produce were records of an organization known by the name of the Joint Anti-Fascist Refugee Committee. It was and is an unincorporated association having its main office at 192 Lexington Avenue, New York City.

It had a Board which governed its affairs, known as the Executive Board. Mrs. Fleischman was a member of that Board.

On the date in question, the Committee on Un-American Activities of the House of Representatives

36 was composed of the following personnel, some of whom were present and sitting when the defendant appeared before them:

Congressman John S. Wood, of Georgia, was the Chairman; Congressman John A. Rankin, of Mississippi; Congressman J. Hardin Peterson, of Florida; Congressman J. W. Robinson, of Utah; Congressman John R. Murdock, of Arizona; Congressman Herbert C. Bonner, of North Carolina; Congressman J. Parnell Thomas, of New Jersey; Congressman Karl E. Mundt, of South Dakota; and, Congressman Gerald W. Landis, of Indiana.

The Government expects to call as witnesses, possibly a member of the Committee, and Mr. Ernie Adamson, who was counsel for the Committee.—Mr. Adamson is now an attorney in Pittsburgh; Mr. John W. Carrington, Clerk,

We shall also call Mr. Howard Smith, possibly, who is a stenotype reporter who reported the proceedings at the Capitol; and a Deputy Marshal from New York named Thomas G. Farson. It is possible that other persons connected with the Committee on Un-American Activities in some clerical capacity may be called, in addition to those I have mentioned.

I believe that concludes the identification, if the Court please.

THE COURT: Ladies and gentlemen, those 12 of you now occupying seats in the jury box, as well as the other members of the panel, you will please listen to all of the questions put.

37. Do you know any members of the Committee on Un-American Activities of the House of Representatives?

Do you know Mr. Murray, the Assistant District Attorney who is assigned to this case, or any one who works in the District Attorney's office?

Has any member of the panel formed any opinion as to the guilt or innocence of the defendant?

Does any member of the panel know any employee or member of the staff of the House Committee on Un-American Activities?

Does any member of the panel know any person who works, or has worked as an investigator, or undercover man for the House Committee on Un-American Activities?

When I say "man," I also intend to embrace "woman."

Has any member of the panel testified before, or given any information to the House Committee on Un-American Activities?

Does any member of the panel know any person who has testified before, or given information to the House Committee on Un-American Activities?

Has any member of the panel read transcripts of the hearings or reports of the House Committee on Un-American Activities?

Is any member of the panel, that constitutes not only the 12 now in the box, but without,—

MR. MALKIN: You mean—reading?

THE COURT: I cannot hear you.

MR. MALKIN: You mean reading in the newspapers about it?

38 THE COURT: That is not what we are now referring to, sir.

What is the name?

MR. MALKIN: M-a-l-k-i-n.

THE COURT: That is not the question, but I will repeat the question to you, sir:

Has any member of the panel read transcripts of hearings, or reports of the House Committee on Un-American Activities?

Yes, sir!

MR. DAVIS: About six or eight years ago,—bound and published by the Government Printing Office.

THE COURT: What is your name?

MR. DAVIS: Davis.

THE COURT: And you say that was six or eight years ago?

MR. DAVIS: About 1940, '41, '42, '43, '44,—everything up to date from '39, '40, and '41.

THE COURT: All right.

MR. COURTER: I have read excerpts at various times from publications, when the Committee was popularly known as the Dies' Committee. That was about the same time.

THE COURT: What is your name?

MR. COURTER: Courter.

THE COURT: All right, sir.

MR. WILLIAMS: I attended several sessions when they were having it down here, just recently when the movie stars, and so forth were there, and heard recordings on the radio at night.

39 THE COURT: What is your name?

MR. WILLIAMS: James C. Williams.

THE COURT: All right, sir.

Is there any member of the panel, or any member of his or her family, friendly with, related to, or associated with any person who is now, or ever has been associated with the Federal Bureau of Investigation?

MR. PARKER: My wife used to work there. She worked there for five years.

THE COURT: When did she cease to work there?

MR. PARKER: About two or two and a half years ago.

THE COURT: What is your name?

MR. PARKER: Forrest E. Parker.

THE COURT: All right, sir.

MR. BLINKHORN: My wife is a good friend of an FBI agent.

THE COURT: What is your name?

MR. BLINKHORN: Blinkhorn.

THE COURT: Spell it, please.

MR. BLINKHORN: B-l-i-n-k-h-o-r-n.

THE COURT: All right.

MR. PURDY: I have a number of friends working for the Bureau of Investigation.

THE COURT: All right.

MRS. TITUS: I have a friend in the Bureau.

THE COURT: Your name?

40 MRS. TITUS: T-i-t-u-s.

THE COURT: Yes?

MR. WARE: I also have a friend in the FBI.

THE COURT: What is your name?

MR. WARE: W-a-r-e.

THE COURT: Next gentleman?

MR. WILLIAMSON: Your Honor, my boss was a former FBI agent. But, he isn't connected there now.

THE COURT: What is your name?

MR. WILLIAMSON: Williamson.

MR. SWIFT: I know the head of the FBI.

THE COURT: What is your name?

MR. SWIFT: S-w-i-f-t.

THE COURT: By that, you mean Mr. Hoover?

MR. SWIFT: Yes, sir.

MR. MAHONEY: I have a nephew and niece that work in the office of the FBI.

THE COURT: What is your name?

MR. MAHONEY: Mahoney.

THE COURT: Is any member of the panel an employee of the Government?

(Numerous hands were raised.)

THE COURT: Suppose we go to the first one, No. 1.

MRS. BUCKLEY: Regina C. Buckley.

THE COURT: Which department are you in?

41 MRS. BUCKLEY: Treasury Department.

THE COURT: No. 3?

MRS. HALEY: Lizzie A. Haley, Bureau of Engraving and Printing.

THE COURT: Any other ones in the back row, other than those who have responded?

Mrs. Isaacs,—you indicated you were in a department.

MRS. ISAACS: Labor Department.

THE COURT: No. 8?

MR. F. E. PARKER: I am with the Veterans Administration.

THE COURT: No. 9, sir?

MR. R. PARKER: Federal Works Agency.

THE COURT: I am sorry, I didn't hear.

MR. R. PARKER: Federal Works Agency.

THE COURT: What is your name?

MR. R. PARKER: Reginald Parker.

THE COURT: Very well. No. 10?

MR. PRICE: Jesse R. Price, U. S. Post Office.

THE COURT: No. 11?

MR. SAUNDERS: Eulis T. Saunders, Pentagon, War Department.

THE COURT: No. 12?

MR. SHIPLEY: Shipley, W. E.,—General Accounting Office.

THE COURT: Excuse me a minute.

(Thereupon, counsel approached the bench and the following proceedings were had without the hearing of those in the courtroom:)

42 MR. ROGGE: It would take too much time to cover all the people—

THE COURT: I was going to say that, when Mr. Rogge took the words from me. I suggest, as I was thinking, that we deal with these as to that question, and if we get to the others, we can deal with the others specifically at the time.

(Thereupon, counsel returned to the trial table and the following proceedings were had in open court:)

THE COURT (Addressing those of the panel not in the jury box) We will come back to you gentlemen or ladies, if need there be, and put the same questions to you.

Is there any member of the 12 now seated in the box who is an applicant for a position with the United States Government?

Is any member of the immediate family of any member of this panel a Government employe, or an applicant for a Government position?

MR. COMER: Comer, George F. My step-father is with the Public Buildings Administration.

MRS. HALEY: I have relatives in the Navy Yard.

THE COURT: No. 4?

MR. SWIFT: I have two nephews who are Army officers.

THE COURT: Any other ones in the back row?

All right, then.

MRS. ISAACCS: My daughter is in War Assets.

43 THE COURT: No. 9, did you have your hand up?

MR. R. PARKER: My wife is employed as an elevator

operator by the Federal Works Agency,—Department of Justice.

THE COURT: All right.

MR. ROGGE: I didn't hear that.

THE COURT: Elevator operator at the Department of Justice.

No. 10?

MR. PRICE: My wife is employed at the Government Printing office, and I have a number of relatives—

THE COURT: Sir?

MR. PRICE: I have any number of relatives. I don't know if you want me to name them.

THE COURT: You have relatives?

MR. PRICE: Yes, sir.

THE COURT: What are the relationships?

MR. PRICE: Cousins.

THE COURT: Where are they employed?

MR. PRICE: Different places.

THE COURT: Is any one of them employed in the FBI?

MR. PRICE: No, none in the FBI.

THE COURT: Or, in the Department of Justice, proper?

MR. PRICE: One is at Walter Reed Hospital, another at the Veterans Administration.

THE COURT: All right. No. 12?

44 MR. SHIPLEY: I have a brother in the Tariff Commission.

THE COURT: No. 11,—yes?

MR. SAUNDERS: I have a cousin at the Veterans Administration.

THE COURT: Very well, sir.

The next question is somewhat in the nature of a duplication:

Is any member of the immediate family of any member of this panel a Government employee, or an applicant for a Government position?

You have answered that, substantially.

Does any one of you have anything to that which you have given?

MRS. HALEY: I have a brother who works for the Government, also, at the Bureau of Engraving and Printing.

THE COURT: Has any member of the panel, or a member of his or her immediate family, associated, or has any member been associated with any agency, either public or private, engaged in detection of law violations?

A MAN: Here, sir.

THE COURT: We will come back to you, sir, if you will.

Is any member of the panel, or his immediate family, associated with any person who is now associated with any agency of law enforcement?

Are any members of this panel, or members of 45 their immediate family, receiving pensions or other benefits from the Government or any of its agencies?

No. 4,—sir?

MR. SWIFT: I am a retired foreign service officer.

THE COURT: That is yourself?

MR. SWIFT: Yes, sir.

THE COURT: You mean by that, you were associated with the State Department, sir?

MR. SWIFT: Yes, sir.

THE COURT: Any other member,—No. 1?

MRS. BUCKLEY: I had a brother who was a retired Government clerk.

THE COURT: Where was he employed?

MRS. BUCKLEY: He was with the Social Security Board.

THE COURT: No. 9?

MR. R. PARKER: My mother retired from the Bureau of Engraving.

THE COURT: All right, sir.

Does any reason suggest itself to any one of you why you should not sit as jurors in this case and render a fair

and impartial verdict solely on the evidence, and under instructions as to the law given by the Court?

Has any member of this panel read or heard anything concerning this case?

Do you know anything about the Joint Anti-Fascist Refugee Committee?

46 Yes, sir!

MR. MALKIN: I read about it in the newspapers.

THE COURT: What is your name?

MR. MALKIN: Henry Malkin.

THE COURT: Is there any member of the panel, or a member of his immediate family, a member of any of the following organizations:

Americans for Democratic Action;

Americans for Action;

Tool-Owners Union;

National Economic Council;

Small Business Men's Association;

Christian Front;

America First Committee;

National Committee to Keep Out of Foreign Wars;

Constitutional Educational League;

We, The Mothers;

Coalition of Patriotic Societies;

American Anti-Communist Association;

Ku Klux Klan;

Knights of Columbus—

MRS. BUCKLEY: I have a brother who is a Knights of Columbus.

THE COURT: And you are No. 1 juror.

MRS. BUCKLEY: Yes, sir.

47 MR. MAHONEY: Mahoney,—I have two brothers in the Knights of Columbus.

THE COURT: Mr. Mahoney,—yes.

MR. BYRNE: I have a brother that is a member of the Knights of Columbus.

THE COURT: And your name?

MR. BYRNE: Francis Byrne.

THE COURT: Any member of the American Legion?

MR. PARKER: Forest E. Parker.

THE COURT: No. 8?

MR. F. E. PARKER: Yes, sir.

THE COURT: You are a member?

MR. F. E. PARKER: Yes, sir. I don't take an active part in it. I joined because a friend of mine was active.

THE COURT: No. 2?

MR. COMER: My step-father is a member of the American Legion.

THE COURT: No. 3?

MRS. HALEY: My son, son-in-law, and my brother.

THE COURT: Anybody else in the back row?

Any other member of the 12 now in the box?

THE COURT: What is your name?

MR. JESSEN: Harry A. Jessen.

THE COURT: You are a member of the American Legion?

MR. JESSEN: Yes, sir.

48 THE COURT: Yes, sir.

MR. ALBERT: John H. Albert, A-l-b-e-r-t.

THE COURT: Mr. Albert, you are a member of the American Legion?

MR. ALBERT: Yes, sir.

THE COURT: Yes, sir?

MR. WILLIAMS: James C. Williams. I am a member.

THE COURT: You are a member?

MR. WILLIAMS: Yes, sir.

THE COURT: And you?

MR. DOWNS: Howard Downs, my brother and I.

THE COURT: Yes, sir?

MR. HURNEY: Hurney, H-u-r-n-e-y, Leo B., my brother and nephew.

THE COURT: Yes, Mr. Mahoney.

MR. MAHONEY: My brother.

THE COURT: Your brother?

MR. MAHONEY: Yes, sir.

MR. DAVIS: Davis, H. C., American Legion, George Washington Post, member.

THE COURT: Is there any member of the panel, or member of his immediate family who is a member of, or affiliated with any organization, society, lodge or fraternity which by resolution or otherwise has taken a position calling for cooperation or friendship between the
49 United States and Franco-Spain?

Has any member of the panel read any of the following papers or periodicals?

The New Leader

The Militant

The Tablet

The Cross and Flag

The Crusader

Counterattack

The New York Inquirer

Has any member of the panel listened to the radio broadcast of Henry F. Taylor, or Fulton Lewis, Jr.?

(Several jurors held up their hands.)

THE COURT: Numbers 1, 3 and 4.

Number 1?

MRS. BUCKLEY: Both of those two.

THE COURT: Fulton Lewis?

MRS. BUCKLEY: Yes.

THE COURT: Number 3.

MRS. HALEY: Fulton Lewis, a very few times.

THE COURT: And Number 4, sir.

MR. SWIFT: Fulton Lewis.

THE COURT: We will come back to the others.

Has any member of the panel read or discussed any
50 matters in the newspapers, or in any books or Gov-
ernment publications relating to the Joint Anti-
Fascist Refugee Committee?

Mr. Malkin?

MR. MALKIN: As I said before I read about it.

THE COURT: I understand.

Would your judgment of the defendant's guilt or innocence be affected by the fact that the defendant has criticized the House Committee on Un-American Activities?

Would your judgment of the defendant's guilt or innocence be affected by the fact that the proceedings against the defendant which resulted in this trial were initiated by the House Committee on Un-American Activities?

Have you any prejudice against persons who have become,—strike that, Mr. Reporter.

Have you any prejudice against foreign born persons who have become citizens of this country?

Have you any prejudice against Spanish Republicans who fought against Franco and who are now refugees in France or Mexico?

Do you have any prejudice against such persons because they fought to uphold their regularly elected government against the rebellion led by Franco?

A MAN: What was that?

THE COURT: Do you have any prejudice against such persons because they fought to uphold their legally elected government against the rebellion by Franco?

As to this next question, I will address it to those
51 who are now in the box:

To what organizations do you belong, and I will say if you have stated that you are a member of the enumerated ones, it will not be necessary for you to repeat.

I will start with Juror No. 1.

MRS. BUCKLEY: What is the question now?

THE COURT: To what organizations do you belong?
I take it there Mr. Rogge you mean whether you belong to the American Legion, the Masons, Knights of Columbus or Jewish—

MR. ROGGE: Any other type.

THE COURT: Is that it?

MR. ROGGE: And I entirely agree with your later statement, in addition to those already mentioned.

THE COURT: Very well.

MRS. BUCKLEY: None.

THE COURT: By your silence, the Court will now understand that except where you have specified the organization, you are not members of any others.

As to the next one, you need not repeat, if you have stated:

To what organizations does your wife or husband belong? In other words, has any lady or gentleman a husband or wife who belongs to an organization which you have not stated?

Have you ever sat on a jury, any jury, or has any 52 relative or friend ever sat on any jury in any case involving the House Committee on Un-American Activities.

MR. ANDERSON: We sat on the Camp case in Judge Laws' Court, last week, sir.

THE COURT: The Camp case?

MR. ANDERSON: Yes, sir.

THE COURT: And that is true as to Juror No. 6, too?

MR. BERK: Yes, sir.

THE COURT: This question is directed to those who are in government employ:

In connection with your work, have you been questioned about alleged subversive activities, or persons or organizations engaged in such activities by any person in authority.

MR. SUTTON: I was questioned some years ago.

THE COURT: If you may, just answer at this time you say you have been questioned?

MR. SUTTON: Yes, sir, by the F.B.I.

THE COURT: Give me your name.

MR. SUTTON: Sampel W. Sutton.

THE COURT: All right, Mr. Sutton.

Have any of you who are employed by the Government had any discussion with other Government employees on questions concerning subversive activities, or persons or organizations engaged in such activities?

53 Have you ever been questioned by your superiors or the person in authority in your department, or by investigators in your department on alleged subversive activities, or persons or organizations engaged in such activities?

MR. PURDY: Would that question embody the routine answers to questionnaires sent around as to associations or affiliations?

THE COURT: What is your name?

MR. PURDY: P-u-r-d-y.

Such questionnaires have been sent throughout the government, loyalty questionnaires.

THE COURT: You did get that, sir?

MR. PURDY: Yes, sir.

THE COURT: Yes?

MRS. HALEY: Your Honor, I think everybody in the Government got those papers in regard to loyalty. We all had them to fill out.

THE COURT: That is No. 1 and 3.

Number 7?

MRS. ISAACS: I received one.

THE COURT: 8, 10, 11 and 12.

We will come back to those out of the box.

MR. ROGGE: Did Your Honor also note No. 9, on the receipt of the loyalty questionnaires?

THE COURT: No. 9, you did not raise your hand.

MR. R. PARKER: Yes, sir.

THE COURT: Very well.

54 Have you ever been questioned in reference to subversive activities by investigators of the Civil Service Commission, the Federal Bureau of Investigation, or the Department of Justice?

Would your employment by the Government influence you in any way toward the Government's side of the case as against the defendant?

The names of the following persons may be mentioned during the course of this trial:

Martin Dies; John S. Wood; J. Parnell Thomas; Ernie Adamson; Robert E. Stripling; John T. McManus; Tom C. Clark; J. Edgar Hoover; Harold L. Ickes; Henry A. Wallace; Franklin D. Roosevelt;

Do you or did you know any of these persons or have you any prejudice for or against any of them?

MR. SWIFT: I did.

THE COURT: Yes, sir.

MR. SWIFT: I said I knew Mr. Hoover.

THE COURT: What is your relationship with him?

MR. SWIFT: I just met him and talked to him casually.

THE COURT: Did you have any official business with him?

MR. SWIFT: No.

THE COURT: In other words, your sole contact was of a social nature?

MR. SWIFT: Yes, sir.

55 THE COURT: And slight?

MR. SWIFT: Yes, sir.

THE COURT: Do you know any past or present members of Congress?

Excuse me, we will come back to you, sir.

MR. PURDY: I had quite a bit of contact with Mr. Wallace when he was Secretary of Agriculture.

THE COURT: Official or social?

MR. PURDY: Social.

THE COURT: Would that contact prejudice you for or against the defendant or the Government in this case?

MR. PURDY: It might be embarrassing, sir.

THE COURT: What is your name?

MR. PURDY: Purdy.

THE COURT: Yes, sir?

MR. GARNER: I know several of those mentioned, Your Honor, only casually. I know Mr. Hoover. I know Mr. Wallace. I was with the Coast and Geodetic Survey until I retired a year ago, and my knowing him came through that office.

THE COURT: Would your acquaintance with either or both of those prejudice you in any wise in this case, for or against the defendant?

MR. GARNER: No, sir.

THE COURT: I said as to either or both, did you understand?

56 MR. GARNER: Yes, sir.

THE COURT: Give me your name.

MR. GARNER: Garner, G-a-r-n-e-r, Herman L.

THE COURT: That was Wallace and Hoover, is that what you said?

MR. GARNER: I knew Mr. Dies, just a speaking acquaintance with him.

THE COURT: I will ask you as to Mr. Dies, if your association with him is such as it would prejudice you for or against the defendant in this case?

MR. GARNER: No, sir.

THE COURT: Yes, sir?

MR. ANDERSON: I have met Mr. Andresen, who is now a member of Congress, professionally, through my work at Children's Hospital. I met him on about three different occasions.

THE COURT: Would your relationship with, or acquaintance with him be such as to prejudice you for or against the defendant or the Government in any way in this case, sir?

MR. ANDERSON: No, sir.

THE COURT: Yes, sir?

MR. SWIFT: I know Congressman Thomas from Texas, and Congressman Monroney, from Oklahoma.

THE COURT: What is your relationship with them?

MR. SWIFT: Purely social.

57 THE COURT: Would your relationship with them be such as it would affect or cause you any embarrassment in this case?

MR. SWIFT: No.

THE COURT: Or effect a prejudice for or against the Government or defendant?

MR. SWIFT: No, sir.

THE COURT: Yes, sir?

MR. JESSEN: Congressman Andresen from Minnesota, and Congressman Talle from Iowa.

THE COURT: What was that relationship, professional, business or social?

MR. JESSEN: Social.

THE COURT: Would your acquaintance with the two Congressmen you enumerated prejudice you in your determination of this case for or against the Government?

MR. JESSEN: No, sir.

THE COURT: Give me your name.

MR. JESSEN: J-e-s-s-e-n.

MR. WARE: I know Congressman Sascer.

THE COURT: What is your name?

MR. WARE: W-a-r-e.

THE COURT: Is your relationship social, or what?

MR. WARE: He is one of the directors of the building association I work for.

58 THE COURT: Would you be prejudiced in that case for or against the defendant or the Government by virtue of that, sir?

MR. WARE: No, sir.

A MAN: Your Honor, I am acquainted with Senator Hawkes of New Jersey, a member of the Board of Directors of our organization.

THE COURT: Is your relationship with him such as it would effect a prejudice in this case for or against the defendant or Government?

A MAN: No, sir.

MR. EDMISTON: I know Tom Clark and Senator Connally of Texas.

THE COURT: What is your relationship with them?

MR. EDMISTON: Purely social.

THE COURT: Social?

MR. EDMISTON: Yes, sir.

THE COURT: Would you be embarrassed by sitting in this case, or would that affect or prejudice you for or against the defendant or the Government in this case?

MR. EDMISTON: No, sir.

THE COURT: What is your name?

MR. EDMISTON: E-d-m-i-s-t-o-n.

THE COURT: Edmiston?

MR. EDMISTON: Yes, sir.

MR. WOLF: May we have the name of the other (referring to the previous speaker).

59 **MR. KEEFER:** Keefer.

THE COURT: The next question may be a duplication, but I will put it to you anyway:

Do you know any past or present members of Congress? If you have enumerated them, do not repeat. If you have any additional ones, so state.

A MAN: Burton K. Wheeler, Senator from my town, formerly.

THE COURT: Was your relationship with him—what was it, first?

A MAN: Well, it was mainly professional relationship.

THE COURT: Would your relationship with him, in the professional manner you stated, be such as to affect or prejudice you in any way in this case, either for the Government or the defendant?

A MAN: No, Your Honor.

THE COURT: Number 4?

MR. SWIFT: I also knew Senator Wheeler.

THE COURT: What was your relationship?

MR. SWIFT: Social, purely.

THE COURT: Would that be such as it would affect or prejudice you for or against the Government or the defendant?

MR. SWIFT: No, sir.

THE COURT: All right, sir?

MR. PURDY: I am acquainted with Senator Barkley in a social way. It would not affect me.

60 THE COURT: Neither for or against the Government or defendant?

MR. PURDY: That is right.

THE COURT: That is Mr. Purdy, isn't it?

MR. PURDY: That is right, yes, sir.

THE COURT: Do you know anyone in the employ of any member of Congress, or of the Congress, other than that that has been stated? Mr. Keefer?

MR. KEEFER: I have.

THE COURT: Do you know anyone?

MR. KEEFER: I have a sister-in-law who is employed by a Senator.

THE COURT: Who is the Senator?

MR. KEEFER: I can't think of the name, from North Carolina.

THE COURT: Yes?

MR. ANDERSON: A former secretary of mine is now secretary to a Congressman from Maine, I can't think of his name.

THE COURT: That is Mr. Anderson?

MR. ANDERSON: Yes, sir.

THE COURT: Yes, sir?

MR. PURDY: I know the secretary to Senator Barkley?

THE COURT: Yes?

A MAN: I didn't mention awhile ago, I know Congressman—a Congressman and his secretary—Mr. Bart.

61 THE COURT: And is your relationship with them such it would affect or prejudice you in any

way, either for or against the defendant or the Government?

A MAN: No sir.

THE COURT: Yes! State your name.

MR. ENGLE: I know the secretary to Senator Wiley.

THE COURT: What is your relationship to the secretary?

MR. ENGLE: None.

THE COURT: What is your acquaintance, friendship or social?

MR. ENGLE: Social.

THE COURT: Social only?

MR. ENGLE: Only.

THE COURT: Would that effect a prejudice for or against the defendant or Government in this case?

MR. ENGLE: Not at all.

THE COURT: Yes, sir.

A MAN: I know Secretary Burton, secretary to Congressman Andresen.

THE COURT: Your relation to him is what?

A MAN: Social.

THE COURT: Would that effect a prejudice for or against the defendant or Government?

A MAN: In no way, sir.

THE COURT: You say you know him, and no
62 prejudice would flow as to either the Government or the defendant?

A MAN: No, sir.

THE COURT: Do you know anyone employed or formerly employed by the Department of Justice or by the Federal Bureau of Investigation? Again, I will say to you ladies and gentlemen if you have stated so, you need not repeat. If you have anything additional, of course you may state it.

MR. JESSEN: I know a man in the Department of Justice, William B. Walters.

THE COURT: What department?

MR. JESSEN: Department of Justice.

THE COURT: What branch?

MR. JESSEN: Income Tax Evasion.

THE COURT: All right, sir.

MR. NEVES: I have a friend in the Department of Justice.

THE COURT: What branch is he in, do you know?

MR. NIEVES: No, I don't.

THE COURT: You don't know the division or bureau?

MR. NIEVES: She is secretary to an attorney.

THE COURT: I can't hear you.

MR. NIEVES: She is secretary to an attorney there.

THE COURT: But you don't know what division?

MR. NIEVES: I don't know the division, sir.

THE COURT: All right, sir.

63 MR. HURNEY: I have a deceased brother's widow who is attorney for the Immigration and Naturalization Service, of Justice, in Philadelphia.

THE COURT: Hurney was the name?

MR. HURNEY: Yes, sir.

THE COURT: That would not influence any opinion of yours one way or the other in this case?

MR. HURNEY: No, sir.

THE COURT: Again I will say, do not repeat if you have answered this question in part:

Have you or any members of your family ever been employed by the U. S. Government? If you have anything additional as the result of that question, state it, otherwise you need not.

MR. ANDERSON: My brother-in-law did work for the Government years ago and I haven't heard from him in at least ten years, so I don't know whether he is at the present time or not.

THE COURT: You don't know where he works?

MR. ANDERSON: No, sir.

THE COURT: Number 4?

MR. SWIFT: I have two brothers who are retired Army officers.

THE COURT: What?

MR. SWIFT: Army officers.

THE COURT: Number 11?

64 MR. SAUNDERS: I did have a brother who worked in the Post Office.

THE COURT: Used to work there?

MR. SAUNDERS: Yes, sir.

THE COURT: Number 12?

MR. SHIPLEY: My wife and another brother used to work in the Government.

THE COURT: Where did he work, and your wife?

MR. SHIPLEY: Reconstruction Finance, and 3-A's.

THE COURT: State your name.

MR. DOWNS: Howard Downs. I have two brothers that used to work at the Navy Yard.

MR. GARNER: I have a brother-in-law over in the Post Office Department, and a sister-in-law in the same Department.

THE COURT: Mr. Purdy?

MR. PURDY: I have a wife who worked for the Government at one time, ten years ago.

THE COURT: What department?

MR. PURDY: Agriculture.

THE COURT: State your name.

MR. MAHONEY: A brother, Railway Mail Clerk.

THE COURT: Yes.

MR. EDMISTON: My wife works for the General Accounting Office, and a brother-in-law.

THE COURT: State your name.

65 MR. KNORL: Williston Knorl.

THE COURT: Yes?

MR. KNORL: My mother and sister and I used to work at the Navy Yard in Washington.

THE COURT: What is your name?

MR. McKELVEY: McKelvey.

THE COURT: Did you say McKelvey?

MR. MCKELVEY: Yes, sir.

THE COURT: Yes, sir?

MR. MCKELVEY: My brother is manager of Civil Service in Philadelphia.

THE COURT: Yes?

MR. PARKER: I have an uncle who is messenger to Justice Jackson.

THE COURT: Of the Supreme Court?

MR. R. PARKER: Yes, sir.

MRS. HALEY: My daughter was secretary to Major Callahan, deceased. She doesn't work.

THE COURT: You mean the Major, or the Superintendent of Police?

MRS. HALEY: Yes, sir, and I also had a sister working with the Government Printing Office.

MR. SUTTON: Sutton, sir.

THE COURT: Samuel Sutton?

MR. SUTTON: Yes, sir. My wife worked at the
66 I.C.C.

THE COURT: Yes?

MR. WILLIAMS: My wife is employed at the Signal Corps, War Department.

THE COURT: Yes.

MR. PURDY: Two sons in the Army of the United States.

MR. GAUNT: G-a-u-n-t. I have a brother in the Government Printing Department.

MR. HORN: My wife works for the Census Administration and I have an uncle who worked for the Government Printing Office.

THE COURT: And your name, sir?

MR. GRANT: G-r-a-n-t. My wife works for the Interior Department.

MR. HURNEY: Do I understand you want the relatives who are in the service now, Government service?

THE COURT: The question is, have you any member of your family who has been employed—

MR. HURNEY: I have two brothers now in the Government service.

THE COURT: Where?

MR. HURNEY: One is in the War Department and one is in the Comptroller General's office.

THE COURT: All right, Mr. Hurney.

Yes!

67 MR. COURTER: I am myself employed in the Securities & Exchange Commission.

MR. TRAINOR: I work for the Navy Yard.

MR. KEEFER: My wife works at the General Accounting Office.

MR. NIEVES: My wife works at the General Accounting Office, and my sister-in-law works for the Atomic Energy Commission.

THE COURT: What?

MR. NIEVES: My sister-in-law is employed by the Atomic Energy Commission.

THE COURT: All right.

MR. NIEVES: And father-in-law with the Bureau of Standards.

THE COURT: Yes!

MRS. HOOD: Gertrude Hood, Government Printing Office.

MR. HORN: Horn, with the Navy, also a brother with the Navy, and sister with the Coast Guard.

MR. HURNEY: I forgot to mention I was with the State Department.

MR. McKELVEY: I am with the Maritime Commission.

MR. JESSEN: I neglected to mention that I am employed by the U. S. Office of Education.

THE COURT: What is your name?

MR. JESSEN: J-e-s-s-e-n.

68 MR. NIEVES: I work for War Assets, myself

THE COURT: Mr. Sutton?

MR. SUTTON: City Post Office.

THE COURT: I can understand that, because we put that question originally addressed to the twelve in the box.

MR. GELBAUM: Federal Works Agency.

MR. PURDY: Department of Agriculture.

MR. EDMISTON: General Accounting Office.

MR. MAHONEY: Navy Yard.

MRS. TITUS: Does that mean any children in the service? My name is Titus.

THE COURT: They are not now?

MRS. TITUS: No.

MRS. SICHERMAN: I am with the Bureau of Standards.

MRS. CHESTERMAN: Reconstruction Finance.

MR. BISHOP: City Post Office.

MR. GAUNT: War Department.

MR. WOOD: Department of Agriculture. I have a brother in the Post Office, a sister in the Navy Department, and another sister in the Bureau of Engraving.

MR. DAVIS: Davis, H. C., Civil Service Commission.

MR. ROSS: A wife at the Navy Yard.

THE COURT: Navy Yard?

MR. ROSS: Yes, sir.

THE COURT: All right.

MR. HARLEY: I have a brother at the Navy Yard.

69 MRS. PATTERSON: One sister with the Treasury and one sister in the General Accounting Office.

MR. BYRNE: City Post Office, Byrne is the name; and a brother and two sisters in the Navy Department.

THE COURT: Yes, sir?

MR. ALBERT: Sister in the Navy Department.

MRS. LOWE: Veterans Administration Hospital.

MR. SAUNDERS: I forgot, I have a brother working at the State Hospital at Raleigh, North Carolina.

THE COURT: That is a State Hospital?

MR. SAUNDERS: Yes, sir.

THE COURT: I may have confused you when I got into this question. I asked all, not only the twelve now in the box, but those without the box, whether you or any member of your family is now in the Government service.

I will understand you from now on.

MR. WILLIAMS: I forgot, my son is still in the U. S. Navy.

THE COURT: Give your name.

MR. WILLIAMS: Williams, C. J.

THE COURT: All right. No other statement by any one with reference to their employment?

MR. PRICE: My father is with the Public Works Administration.

THE COURT: I again ask whether anyone in 70 this box, or anyone on the panel who has not stated if he or a member of his family is in the employ or was in the employ of the Government.

MR. SUTTON: Sorry, I have a nephew at the City Post Office.

THE COURT: That is Mr. Sutton?

MR. SUTTON: Yes, sir.

MR. TRAINOR: I am also a member of the Marine Corps Reserve, in addition to working in the Navy.

THE COURT: Army, did you say?

MR. TRAINOR: Pardon?

THE COURT: What did you say?

MR. TRAINOR: Marine Corps Reserve.

THE COURT: Yes.

MR. TRAINOR: And I and two brothers were in the Navy.

THE COURT: I think we are going too far, when we go back that far.

You haven't any desire to ask that, have you, gentlemen?

MR. ROGGE: I didn't have that in mind.

THE COURT: I didn't think so.

I am going to ask finally again, so there can be no confusion:

Each of you now in the box and those without the box and on the panel have now answered to all their employment by you or by members of your family, past or present.

71 MR. MAHONEY: I have a sister employed by the Government in the Federal Reserve.

THE COURT: Federal Reserve?

MR. MAHONEY: Yes, but she left there twenty years ago.

A LADY: Does that include nephews, nieces, or cousins and everything?

MR. ROGGE: The question really called for—

THE COURT: I will ask you this, Madam: Are any of them in the Department of Justice or the F.B.I.?

A LADY: No.

THE COURT: Is that all?

Turning to another question, ladies and gentlemen: Have you or any members of your family ever worked for the District of Columbia—that means, the District of Columbia Government.

MR. ROGGE: Right, Judge.

MR. ALBERT: Does that include the District schools?

THE COURT: Yes.

MR. ALBERT: My wife is Principal of the Harrison School.

MR. BYRNE: I have a brother in the District Traffic Division, I believe it is.

MR. KNORL: Does that include your family?

THE COURT: Yes, sir. I will put it to you—

MR. KNORL: I have an aunt that is a teacher at—

72 THE COURT: That is Mr. Knorl?

MR. KNORL: Yes, sir.

THE COURT: Teaching where?

MR. KNORL: At the Lincoln School, and I have an uncle that taught at Patterson, who died, and some more I can't think of.

THE COURT: Do you recall anyone who was a member of the F.B.I. organization, or the Department of Justice?

MR. KNORL: I have a cousin on the Police Force.

THE COURT: Of the District of Columbia?

MR. KNORL: Yes, sir.

THE COURT: A cousin?

MR. KNORL: Yes, sir.

MR. WARE: I have a cousin that is a teacher at Eastern High School.

THE COURT: That is Mr. Ware?

MR. WARE: Yes, sir.

THE COURT: As to those in the box first, suppose you gentlemen come to the Bench a minute.

(Thereupon counsel approached the Bench and the following proceedings were had without the hearing of those on the jury.)

THE COURT: I am wondering if at this point, if it would not be more practicable not to ask these questions such as how long each one lived in the District of Columbia.

MR. ROGGE: We will waive that.

73 THE COURT: And "Where did you live before?"

MR. ROGGE: We will waive that.

THE COURT: And whether they are married, we've gotten everything.

MR. ROGGE: Yes.

THE COURT: Do you waive that?

MR. ROGGE: Yes.

THE COURT: "Where did your wife live before?"

MR. ROGGE: Yes.

THE COURT: "What is your occupation" we have covered.

You didn't ask—

MR. ROGGE: We went down to 49, and 49 you covered, too.

THE COURT: And 27, 28 and 29 you gentlemen now waive!

MR. GOLDMAN: The occupation—

THE COURT: We will come to those, those not in the Government employ, certainly.

Wait a minute, let me get it straight so there won't be any question about it.

31 you did not ask for, sir. I will ask it, though, if you want it; and, you say 49 has been covered?

MR. GOLDMAN: 49 you have covered.

THE COURT: That leaves us with the occupations.

(Thereupon counsel resumed their places at the trial table and the following proceedings were had in open court.)

74 THE COURT: Now, as to prospective jurors in the box, those of you who have answered that you are employed by the Government, have answered this question.

Number 2 juror, I understood you to say you were not in the Government.

MR. COMER: Yes, sir.

THE COURT: What is your employment?

MR. COMER: I am at the Hecht Company.

THE COURT: The Hecht Company?

MR. COMER: Yes, sir.

THE COURT: Number 3, you are in the Government?

MRS. HALEY: Yes, sir.

THE COURT: Number 4, you are a retired Government employee?

MR. SWIFT: Yes, sir.

THE COURT: Number 5?

MR. ANDERSON: Children's Hospital, Assistant Director of Children's Hospital.

THE COURT: Number 6?

MR. BERK: Lansburgh Department Store, buyer, men's shoes.

THE COURT: I didn't hear you.

MR. BERK: Lansburgh's Department's Store.

THE COURT: And you are in the Department of Labor, No. 7?

MRS. ISAACS: Yes, sir.

THE COURT: Number 8?

75 MR. F. E. PARKER: Veterans Administration.

THE COURT: Number 9?

MR. R. PARKER: Federal Works Agency.

THE COURT: Number 10?

MR. PRICE: Post Office Department.

THE COURT: Number 11?

MR. SAUNDERS: Pentagon, War Department.

THE COURT: Number 12?

MR. SHIPLEY: General Accounting Office.

THE COURT: Does that cover what was given?

MR. MURRAY: I seem to have nothing to suggest.

THE COURT: I will ask you particularly as to those in the box, by way of repetition, does any reason occur to you why you could not sit in this case and render your finding solely on the evidence as adduced from the witness stand, without bias or prejudice or favor to the Government or to the defendant, and to function according to the law as given you by the Court?

MR. MURRAY: Number 7.

THE COURT: Mrs. Cecil A. Isaacs, you are excused from serving on this panel. Resume your seat.

Samuel W. Sutton, take seat No. 7 in the jury box.

Would you gentlemen mind coming to the Bench again?

(Thereupon counsel approached the Bench and the following proceedings were had without the hearing of 76 those in the courtroom.)

THE COURT: In the interest of time, would you want to do it wholesale?

MR. MURRAY: I am willing.

THE COURT: Do you have any feeling, Mr. Rogge, about it one way or another?

MR. ROGGE: I had rather do it one at a time. I do want to save time, too.

THE COURT: We will do it.

MR. ROGGE: While we are up here, at this point I wish to renew my motion to exclude all those who are in the Government employ, on the additional fact now brought out that they all got some sort of blank to fill out with reference to their loyalty requirements, whatever they were.

THE COURT: Anybody have that blank?

MR. ROGGE: I will confess I haven't had it, Judge.

THE COURT: Do you know what it is, Mr. Wolf or Mr. Goldman?

MR. GOLDMAN: One of the forms?

THE COURT: Yes.

MR. GOLDMAN: I don't know, except that I do know that they are rather searching in what they ask. I don't remember the type question.

THE COURT: Can we get that?

MR. MURRAY: We must have them in our office. I have a faint recollection of having filled one out.

77 THE COURT: Maybe I filled one out, too.

MR. ROGGE: I hope not, Judge.

I want to say that I don't want to make the selection of the jury difficult, but Judge, I do have the feeling that people like that just are not free to say "not guilty" if they reach that conclusion. That is why I have to renew that motion on the ground that they have gotten these loyalty questionnaires, whatever they are. I have never seen one.

THE COURT: On what I have at the present time I will deny your motion. If you bring me something that shows something more, we will deal with it, of course. I cannot be advised from what you now say.

MR. ROGGE: Very well.

My associate suggests a challenge for cause as to No. 4. I noticed several times, I thought he was going to answer a question or speak up but he didn't do it.

THE COURT: A challenge for cause, No. 4?

MR. ROGGE: Yes, sir. I don't know whether he has anything additional to say. He was a friend of J. Edgar Hoover.

THE COURT: He knew him and said that his relationship was such, casual in effect, and that it would not prejudice him in any wise to the Government nor the defendant.

78 MR. ROGGE: The thing that occurred to me, I thought several times he was about to speak up and then apparently did not.

THE COURT: Do you want me to bring him up here now and ask him?

MR. ROGGE: Yes, I would like to.

THE COURT: (Addressing Juror No. 4) Mr. Swift, will you come forward, please?

(Mr. Swift approached counsel and the Court at the Bench and conferred without the hearing of those in the courtroom as follows:)

THE COURT: Mr. Swift, I believe you intimated that you had met or knew Mr. Hoover slightly.

MR. SWIFT: Yes, sir.

THE COURT: In a social way.

MR. SWIFT: Yes, sir.

THE COURT: And I understood you to say, to the question put by the Court that that relationship or acquaintanceship, whatever you characterize it as, was such as to not affect you adversely, either for the Government or against the defendant.

MR. SWIFT: No, sir, that is correct.

THE COURT: I will ask you now, do you know any reason why you could not sit on this case or render a finding solely on the evidence and the law the Court will give to you without any prejudice or bias for the Government or the defendant?

79 MR. SWIFT: I am afraid I could not, sir.

THE COURT: All right, sir, you are excused.

MR. SWIFT: I don't think I could.

THE COURT: That is all that is necessary.

(Thereupon counsel resumed their places at the trial table and the following proceedings were had in open court.)

THE COURT: Number 4 is excused.

THE CLERK: E. Kenneth Trainor, take seat No. 4 in the jury box.

THE COURT: It is up to Mr. Rogge.

MR. ROGGE: Will Your Honor indulge me a moment?

THE COURT: Yes.

(Discussion off the record.)

MR. ROGGE: May we approach the Bench?

THE COURT: Yes.

(Thereupon counsel then approached the Bench and the following proceedings were had without the hearing of those in the courtroom.)

MR. ROGGE: With reference to Juror No. 8, F. Parker, he said his wife worked for the F.B.I. for five years, until 2½ years ago, which was part of the period the Joint Anti-Fascist Refugee Committee was under investigation.

THE COURT: His wife worked for the Department of Justice?

MR. ROGGE: The F.B.I.

THE COURT: (Addressing Juror No. 8) Mr. Parker, will you come to the Bench?

MR. F. E. PARKER: Yes, sir.

(Mr. F. E. Parker approached the Bench and conferred with the Court and counsel as follows, without the hearing of those in the courtroom.)

THE COURT: Mr. Parker, did you state that your wife did work for the F.B.I.?

MR. F. E. PARKER: Yes, sir.

THE COURT: And when was that?

MR. F. E. PARKER: She worked from 1939 to the early part of '45, I think it was, she worked for them about five years.

THE COURT: Do you know what division she was with?

MR. F. E. PARKER: No, sir, I don't; because I was in the Army most of the time. I went in the Army in '42, so we never did discuss that, since she got out of it before I got home.

THE COURT: We will excuse you, sir.

MR. F. E. PARKER: Thank you.

(Mr. F. E. Parker then left the Bench.)

THE COURT: Parker is excused.

How about Sutton?

MR. ROGGE: Sutton said he was investigated.

THE COURT: (Addressing Mr. Sutton) Mr. Sutton, will you come forward, please?

81. (Mr. Sutton approached the Bench and the following proceedings were had without the hearing of those in the courtroom.)

THE COURT: Mr. Sutton, you stated there had been some sort of an investigation in your connection.

MR. SUTTON: Yes, sir.

THE COURT: What was the situation? Would it embarrass you to tell?

MR. SUTTON: No. A friend of mine was being investigated by the F.B.I. as to being a member of some—

THE COURT: Was that you? Did you say "you"?

MR. SUTTON: No, my friend.

THE COURT: You had a friend?

MR. SUTTON: Who was being investigated by the F.B.I.

THE COURT: Who—

MR. SUTTON: He was being investigated by the F.B.I. and they questioned me.

THE COURT: About him?

MR. SUTTON: That is right.

THE COURT: In other words they came to you as a character reference to see what your knowledge of this friend of yours was.

MR. SUTTON: Yes, sir, whether he had discussed subversive conversations, or what not.

THE COURT: I see.

82 MR. WOLF: What organization did he belong to?

THE COURT: Who was it that was doing it?

MR. SUTTON: The F.B.I.

MR. WOLF: His friend belonged to some society or organization?

THE COURT: Do you know what organization?

MR. SUTTON: He wasn't a member of any organization, so far as my knowledge was concerned.

THE COURT: You don't know?

MR. SUTTON: That's the information I gave the F.B.I.

THE COURT: Do you know what they accused him of?

MR. SUTTON: They thought he was connected with some subversive organization.

THE COURT: But you didn't know it?

MR. SUTTON: I didn't know it.

THE COURT: All right.

THE COURT: Do you have any questions?

MR. MURRAY: No, sir.

THE COURT: Have a seat.

(Juror Sutton resumed seat No. 7.)

THE COURT: All right, gentlemen.

(Thereupon, counsel resumed their places at the trial table and the following proceedings were had in open court.)

THE CLERK: Garrett E. Ware—

83 MR. WARE: Your Honor, I have a doctor's appointment. Could I be excused?

THE COURT: You have a doctor's appointment?

MR. WARE: Yes, sir.

THE COURT: For your personal welfare?

MR. WARE: Yes, sir.

THE COURT: You may be excused, Mr. Ware.

I understand that is without any objection by counsel.

MR. ROGGE: No objection.

MR. MURRAY: No objection.

THE CLERK: James C. Williams, take seat No. 8.

MR. ROGGE: Is Your Honor waiting for me?

THE COURT: Yes, it is with you.

MR. ROGGE: Mrs. Buckley, No. 1.

THE CLERK: Regina C. Buckley, you are excused from serving on this panel.

Archie G. Anderson, take seat No. 1 in the jury box.

MR. MURRAY: Where is that name?

THE CLERK: On the civil list, number 1 there.

MR. MURRAY: Oh, yes, thank you.

Government is content, if the Court please.

MR. ROGGE: Will Your Honor indulge me a moment?

Mrs. Haley, No. 3.

THE CLERK: Lizzie A. Haley, No. 3, you are excused from serving on this panel.

John C. DeVinney, take seat No. 3 in the jury box.

84. MR. MURRAY: The Government is content, if the Court please.

MR. ROGGE: May we approach the Bench again, if Your Honor please?

(Thereupon counsel approached the Bench and the following proceedings were had without the hearing of those in the jury.)

MR. ROGGE: With reference to Mr. Williams, I understood him to say that he had several friends in the F.B.I., as well as—I didn't get all the facts.

THE COURT: (Addressing Mr. Williams) Come to the Bench, Mr. Williams, please.

(Juror No. 8, Mr. Williams, approached the Bench and

the following proceedings occurred without the hearing of those in the jury.)

THE COURT: You stated you had a number of friends in the F.B.I.

MR. WILLIAMS: No, sir. My boss now is a former F.B.I. agent. He was a former F.B.I. agent.

THE COURT: Would that fact in any wise prejudice you for or against the Government or defendant in this case?

MR. WILLIAMS: No, sir.

THE COURT: Do you know when he was with the F.B.I.?

MR. WILLIAMS: No, sir. I think it has been about three years ago that he opened this contracting business of his own.

THE COURT: What sort of business?

85 MR. WILLIAMS: Contracting, Capital Contracting Company.

THE COURT: What kind?

MR. WILLIAMS: Johns-Manville products, roofing, siding, insulation.

THE COURT: You have some members of your family who are members of the F.B.I.?

MR. WILLIAMS: No, sir.

THE COURT: Anything else?

MR. ROGGE: There were some separate questions that Your Honor had for the new members of the panel—were there any separate questions that you had?

THE COURT: They were all covered except employment, you are right.

While he is here:

You are, of course, in the contracting business from what you said; is that right?

MR. WILLIAMS: Salesman for Mr. McCarthy.

THE COURT: All right.

(Counsel and the juror left the Bench, resumed their several places and the following proceedings were had in open court.)

THE COURT: As to the jurors who have recently taken the box and who have not stated their employment, I ask Juror No. 1, what is your employment?

86 MR. ANDERSON: Clerk for a plumbing supply house, James A. Messer, their shipping clerk.

THE COURT: Any other one?

MR. TRAINOR: Naval Gun Factory, I already stated that.

THE COURT: Any other juror now in the box—No. 3?

MR. DE VINNEY: Hecht Company, engineer.

THE COURT: Hecht Company, engineer?

MR. DE VINNEY: Yes, sir.

THE COURT: Mr. Sutton, you stated?

MR. SUTTON: I stated, yes, sir.

THE COURT: Each of the ones now in the box have stated their employment for the record?

(All in the box nodded assent.)

THE COURT: Do I understand the Government answered "content"?

MR. MURRAY: That is correct, Your Honor.

MR. ROGGE: Mr. Shipley, No. 12.

THE CLERK: Walton E. Shipley, you are excused from serving on this panel.

Howard F. Downs, take seat No. 12 in the jury box.

THE COURT: Mr. Downs, where are you employed?

MR. DOWNS: I work in a print shop.

MR. MURRAY: The Government is content, if the Court please.

MR. ROGGE: We have excused three.

Will Your Honor indulge me?

87 THE COURT: Are you content?

Suppose you gentlemen come to the Bench, please.

(Thereupon counsel approached the Bench and the following proceedings were had without the hearing of those in the jury.)

THE COURT: I think we had better get alternates.

MR. ROGGE: It is agreeable to me. I don't think the case will take over two days, but maybe—

MR. MURRAY: I don't think so.

THE COURT: Should we not get an alternate?

MR. ROGGE: I am asking the question, Mr. Wolf approves.

I think it is always well to have one.

MR. MURRAY: I think it is a good idea to have one.

THE COURT: Mr. Rogge, you have had three challenges already, but if you have any real cause, come to the Bench on it.

MR. ROGGE: All right.

(Thereupon counsel resumed their places at the trial table and the following proceedings were had in open court.)

THE COURT: One or two, gentlemen.

THE CLERK: Alice K. Eaglen, take alternate seat No. 1.

(Thereupon counsel approached the Bench and certain proceedings were had, not recorded by the reporter, at the conclusion of which the following occurred in open court.)

THE CLERK: Alternate No. 1, Alice K. Eaglen, you are excused from serving on this panel.

You may retire to the other side.

Resume your seat on the other side of the courtroom.

Clement L. Garner, take alternate seat No. 1, please.

THE COURT: Mr. Garner, where did you say you were employed?

MR. GARNER: Retired since last May.

THE COURT: You were in the—

MR. GARNER: With the Coast and Geodetic Survey, a bureau of the Department of Commerce; I was in the departmental service.

THE COURT: Yes, sir.

MR. MURRAY: No challenge. We are content.

MR. ROGGE: May we approach the Bench?

(Thereupon counsel again approached the Bench and the following proceedings were had without the hearing of those in the courtroom.)

MR. ROGGE: This man said he knew Hoover and Wallace and others. I wonder whether Your Honor should bring him to the Bench.

THE COURT: All right, sir.

Come to the Bench, please, sir.

(Addressing Mr. Garner, who approached the Bench and was addressed as follows:)

THE COURT: I believe you stated that you
89 knew Mr. Wallace and Mr. Dies and Mr. Hoover.

MR. GARNER: I did, yes, sir.

THE COURT: And I further understood you to say, I may be wrong, of course, but I understood you to say that your contact with them was either professional or slight; is that correct?

MR. GARNER: Professional.

THE COURT: Yes?

MR. GARNER: I mean to say with Mr. Wallace, it was professional. With the others, it was merely social, a casual contact. I just met them. They would not know me.

THE COURT: They would not know you?

MR. GARNER: I know them but they wouldn't know me. I have met them.

THE COURT: Would the relationship such as you have stated in any wise influence you for or against the Government or for or against the defendant?

MR. GARNER: No, sir.

THE COURT: In other words, sir, your acquaintance with these three persons you enumerated is such that you would not be embarrassed nor would you be prejudiced for or against the Government or for or against the defendant in this case?

MR. GARNER: No, sir.

THE COURT: Do you have any question about that?

MR. GARNER: I have no question. There is one thing probably I should tell.

90 THE COURT: Anything you know.

MR. GARNER: Well, I mentioned that I had a brother-in-law in the Post Office Department. He is Assistant Solicitor in the Post Office Department. I didn't bring that part out.

THE COURT: Any further questions?

MR. ROGGE: That is all.

(Thereupon, counsel and the alternate juror resumed their respective places in the courtroom and the following proceedings were had in open court.)

MR. MURRAY: The Government is content.

MR. ROGGE: Excuse Mr. Garner.

THE CLERK: Clement L. Garner, you are excused from serving on this jury.

Horst E. Goede, take seat No. 1 as alternate juror.

THE COURT: What is your employment?

MR. GOEDE: Restaurant business.

THE COURT: Restaurant business?

MR. GOEDE: Yes, sir.

THE COURT: All right, sir.

MR. GOEDE: Night manager.

THE COURT: Sir?

MR. GOEDE: Night manager.

THE COURT: What restaurant?

MR. GOEDE: Cherry Blossom.

THE COURT: You may be seated.

91 MR. MURRAY: Government is content, if the Court please.

THE COURT: Now, ladies and gentlemen—I am guilty of repetition but I want you to listen to this:

Counsel has stated they are content. I will ask you now if any reason occurs to any one of you twelve members of the jury, or the alternate juror, as to why you cannot sit in this case and render your findings solely on the evidence adduced from the witness stand, without any bias or preju-

dice for the Government or defendant, and according to the law as enunciated by the Court.

There being nothing said, Mr. Clerk you may swear the panel.

THE CLERK: Jurors rise and place your right hand on the Bible.

THE COURT: Just a second. Sit down, please.

MR. GOEDE: I would like to be excused on this case because I am night manager. I work seven nights a week and I am the only entertainer in the place. I hardly get any sleep; from here I would be going back to work.

THE COURT: If there is no question, you may be excused.

THE CLERK: George N. Grant, take alternate seat No. 1.

THE COURT: What is the name?

MR. GRANT: Grant, Your Honor. I am having sick headaches. I've got a new place I just bought and I would like to be excused.

THE COURT: Is there any objection, gentlemen?

92 MR. ROGGE: No objection.

THE COURT: Since there is no objection, you may be excused.

MR. GRANT: Thank you.

THE CLERK: Grady Harley, take alternate juror seat No. 1, please.

THE COURT: Mr. Harley, where did you say you were employed?

MR. HARLEY: Taxi driver.

THE COURT: Taxi driver?

MR. HARLEY: Yes, sir.

THE COURT: Have a seat.

MR. MURRAY: No objection, we are content.

THE COURT: Did you hear the last question I put to the jury?

MR. HARLEY: What?

THE COURT: Does any reason occur to you why you might not sit in this case and render a finding solely on the evidence adduced on the witness stand and the law as the Court may give it to you, without prejudice or bias, or sympathy for the Government or the defendant?

MR. HARLEY: None whatsoever.

THE CLERK: Jurors rise and place their right hands on the Bible. Defendant will rise and face the jury.

93 (Thereupon, the jury, composed as follows:

1. Archie G. Anderson	7. Samuel W. Sutton
2. George F. Comer	8. James C. Williams
3. John C. DeVinney	9. Reginald Parker
4. Kenneth Trainor	10. Jesse R. Price
5. John J. Anderson	11. Eulis T. Saunders
6. Samuel C. Berk	12. Howard F. Downs

Alternate #1—Grady Harley

were duly sworn as petit jurors to try the above-entitled matter.)

THE CLERK: Be seated.

(Thereupon counsel approached the Bench and the following proceedings were had without the hearing of those in the jury.)

THE COURT: Have either or both prepared any opening statement?

MR. MURRAY: I don't have any prepared.

MR. ROGGE: In this instance, I do not have, Judge, as a matter of fact.

MR. MURRAY: May I, if I am not interrupting—

MR. ROGGE: Yes?

MR. MURRAY: May I state a request I have to make?

I have a witness, a deputy marshal from New York who has been here since morning. I would like if possible to put him on immediately and make my opening statement tomorrow instead of today.

94 MR. ROGGE: That is agreeable.

MR. MURRAY: Instead of this evening.

THE COURT: Let me ask you this:

I think probably we will take this witness' testimony and then we will recess until tomorrow morning.

MR. ROGGE: Very good.

THE COURT: Gentlemen, let me say this to you:

We are going as far as possible, as far as the Court can see, to see that nothing gets in this thing that will be prejudicial. I ask both of you and all of the gentlemen to assist the Court in doing that, and in your opening statement be careful that you do not open something which might be prejudicial in any way.

In other words, the issues while important are simple, and we should adhere to those. I don't want to be put in position of interrupting either Government or defense, but I am asking you in the interest of orderly procedure and in the interest of the defendant here that we adhere to the issues which are simple but of course important to the Government and to the defendant.

MR. ROGGE: Let me say that when we were trying this before, we had rather divergent views as to what should go into the record and I know I disagreed with

Your Honor at times, but I can say to you that I
95 know the lines Your Honor wanted to follow in that case and I shall conform to them and if there are points where I think it is necessary to make the record material, I will approach the Bench.

THE COURT: Yes, come to the Bench.

All I am asking you is not to do something which would be prejudicial, to make your records at all times and you may come at any time to the Bench.

MR. ROGGE: I know what Your Honor has in mind.

(Thereupon counsel resumed their places at the trial table and the following proceedings were had in open Court.)

MR. MURRAY: That witness I propose to call is in the courtroom. His name is Mr. Farson.

THE COURT: Come forward.

MR. MURRAY: The other Government witnesses are in the courtroom.

THE COURT: Do you want the rule on witnesses?

MR. MURRAY: The others are Adamson and Carrington. They could be excused today.

MR. ROGGE: I am willing to waive the rule.

(Thereupon counsel again approached the Bench and the following proceedings were had without the hearing of those in the jury.)

THE COURT: I don't want you to do anything you don't want to.

MR. ROGGE: I won't, Judge.

96 THE COURT: But in this situation, this is a question of subpoenas, can't we stipulate as to what this situation is without calling the witness, or do you want to call him?

MR. MURRAY: No, I don't, if I can get the stipulation. I will be glad to have it.

MR. ROGGE: Let me see the document.

THE COURT: If there is no question—if there is question as to the form, you can protect yourselves as to that, as you did before, if that is the situation.

MR. ROGGE: Let me consult with counsel a moment.

(Discussion off the record.)

MR. ROGGE: I am afraid that the stipulation can go as to the pertinency, but I don't think we can stipulate as to the rest.

THE COURT: I don't want you to do anything unnecessarily.

(Thereupon counsel resumed their places at the trial table and the following proceedings were had in open court.)

MR. MURRAY: Mr. Farson.

Thereupon,

Thomas Farson

called as a witness by the Government, having been first duly sworn, took the stand, was examined and testified as follows:

Direct Examination

97 MR. MURRAY: Will you mark that as Government Exhibit 1 and 1-A?

THE CLERK: Do you want me to cross out the prior numbers?

MR. MURRAY: No, leave it.

(Two documents were marked for identification only as Government Exhibit Nos. 1 and 1-A, respectively.)

BY MR. MURRAY:

Q Your name, sir, is Thomas G. Farson? A That is right.

Q What is your position, Mr. Farson? A U. S. Deputy Marshal, Southern District, New York.

Q And that is located in New York City, is it? A It takes in as far as Albany, this side of Albany.

Q And includes the City of New York? A That is right.

Q What is the name of the Marshal? A James G. Mulcahy.

Q M-u-l-c-a-h-y? A That is right.

Q Was he the Marshal and you the Deputy in March of 1946? A That is right.

Q Did you at the direction of the Marshal, Mr. Mulcahy, perform duties in relation to the paper I now show you which has been stamped? A I did.

98 Q Government Exhibit, and marked for identification, 1? A I did.

Q Do you recall whether, when this paper was given to you for performance of your duties, a copy, too, was given you? A A copy was given to me?

Q Yes. A Yes, sir.

Q Are you able to identify Government Exhibit 1-A which has been stamped? A I do.

Q Say whether you can or not. A Yes, sir, this is right.

Q What did you do in relation to these papers? A I served that lady right over there (indicating) with that

dark paper, that pink paper, is that what you call it, that subpoena (indicating), this one here.

Q You say you served her. What did you do with the white paper, Government No. 1? A This is our original, we have to return this to our office.

Q What did you do with that in relation to the lady?

A This is the paper I gave to the lady.

99 Q Did you show her the white one? A I did. I had both in my hand when I served her with this.

Q Will you state whether, by looking at that if you need to, on what date you served her and at what hour, as best you can recall? A As far as my recollection goes, I have my return report card here.

Q Have you taken a card— A This is our index card, personal service 3/29/46, her room number and everything else.

THE COURT: Wait just a minute.

(The index card was marked for identification only as Government Exhibit 1-B.)

BY MR. MURRAY:

Q Is that an office card you kept? A That is our index card. We have to keep our files in our office for every service.

Q Did you make it out the same day you served the paper? A The next day. After we serve, after we come in, if it is too late, we come back and do it the next morning.

Q Now, using that insofar as you need to to refresh your recollection, what date did you serve that white paper on this lady, and may the record show that the witness has identified the defendant, Mrs. Fleischman.

100 A March 29.

Q What year? A '46.

Q Do you recall the time of day it was that you served her? A I imagine it was around past 3 o'clock.

Q In the afternoon? A That is right.

Q Did you first see those papers, that is the white and pink papers, on that day, March 29? A That is right.

Q And where did you leave that, where did you see that lady and show her the white one and leave the pink, one with her, in New York? A No. 1, Columbus Avenue.

Q No. 1 Columbus Avenue? A Room 6.

BY MR. MURRAY:

Q 6; is that a hotel or something? A No, it is a building, a corner building on the northeast corner of Columbus Avenue and 59th Street, first floor, one flight up.

MR. MURRAY: That is the end of the direct examination.

101

Cross Examination

BY MR. ROGGE:

Q Mr. Farson, this testimony you have given as to the time of service and things like that, you don't have any independent recollection of that? A I know it was in the afternoon.

Q The date comes from this refresher card, doesn't it? A I remember, yes, too—that is right.

Q From the refresher card? A That is right. I would have to look at that.

Q As a matter of fact when I questioned you about similar documents once before, you didn't even remember the correct color of the copy that you left, wasn't that right? Do you recall—the same copy as the original? A Sometimes there is white ones, sometimes yellow ones, sometimes we have a lot of colors like that.

Q When I asked about similar documents before, you stated the copy you served was the same color as the original, namely, white. A I don't know whether I really said it or not. I don't remember that now.

Q If I call your attention to the testimony— A If I said it, I said it.

Q —call your attention to the testimony, would
102 you refresh your recollection? A I guess if I said
it, it must be right.

Q Do you remember I asked you about documents like
this once before, recall that? A I think it was last sum-
mer sometime.

Q That is right, and I asked you—now you say you
served duplicates of these, is that correct, and you said
yes, the same thing on the duplicate that was on the origi-
nal, and I said to you, the same color, and you said yes. Do
you recall being asked those questions and giving those
answers? A I don't really remember that.

Q What? A I don't remember.

Q Don't remember those questions and answers from
last summer? A Don't remember the statement about
the color.

Q You are not going to say this record is wrong, are
you? A No, I am not saying it is wrong. I say I don't
remember your asking the question. If it is down there,
I must have said it.

Q There isn't any doubt it is down here, sir. Did you
say the one—do you want to look at it? A No, if you
read it off, it must be right.

Q You don't remember that, yet you say you do
103 remember serving this subpoena. A Yes, I had
to serve the subpoena because—

Q How many of those do you serve every day? A Oh,
it is different numbers.

Q How long have you been a deputy? A Five years.

Q How many of those have you served? A Quite a
number.

Q And you really mean to tell us, where you first begun
by saying you don't remember these questions and answers,
that you remember the particular person on whom you
served this document? A Yes, I recollect the lady now,
as I see her.

Q Now, you were never Sergeant at Arms of the House of Representatives, were you? A No, sir.

Q Were you ever a special messenger? A No, sir.

Q Who gave you these documents? A Our Docket Clerk of the Seventh District, U. S.

Q Speak louder. A The Docket Clerk of the Seventh District.

Q Who is that? A John Sigmund.

Q That is the first time you saw them, is that right?

A What do you mean first time I saw them?

104 Q When he handed them to you? A That is right, that is right.

Q Do you know John S. Wood? A No, sir.

Q Do you know his signature? A No, sir.

Q Do you know John Carrington? A No, sir.

Q Do you know his signature? A No, sir.

MR. ROGGE: That is all.

MR. MURRAY: I did forget to ask about Mr. Carrington.

Redirect Examination

BY MR. MURRAY:

Q Is that your signature, that typewritten signature on the paper? A Yes, sir.

Q I mean the handwriting signature of Thomas G. Farson; is that your writing? A Yes, sir.

Q Is that your signature? A Yes, sir.

Q That is the return you made of that summons is that right? A Yes, sir.

105 Q You were asked how many papers you had served. I will ask you how many papers coming from a committee of Congress have you served in New York? A Oh, I really couldn't state that.

Q Has it been many or few? A Well, not so very many.

Q Could you give an estimate of the number? A Oh, maybe five or ten, something like that.

MR. MURRAY: That is all I have to ask.

MR. ROGGE: That is all.

THE COURT: That is all.

MR. MURRAY: May the witness be excused?

MR. ROGGE: Agreeable.

THE COURT: With no objection, you are excused, sir.

(The witness was excused.)

MR. MURRAY: The witness has asked for the return of this card.

MR. ROGGE: That is also agreeable.

THE COURT: Very well.

MR. MURRAY: That is Government 1-B, being returned to the witness.

THE COURT: I think we will recess now.

Ladies and gentlemen of the jury, I am going to ask you to listen to the Court's admonition, and if either

106 counsel has anything to add, please state it:

Ladies and gentlemen of the jury, we are about to recess, to return to this courtroom tomorrow morning at 10:00 o'clock.

Before doing so, the Court admonishes you as follows:

You are not to talk to anyone about this case, nor are you to permit anyone to talk to you about this case; nor are you at this time to talk among yourselves with reference to this case; nor are you to read or listen to any item which might appear in the newspapers or on the radio pertaining to this case.

Is there any admonition either side would like to have added to that?

MR. MURRAY: I have no suggestion.

MR. ROGGE: That is agreeable.

THE COURT: With that admonition, ladies and gentlemen of the jury, you are excused to return tomorrow morning at 10:00 o'clock.

(Thereupon, the Court proceeded with the consideration of other matters.)

Proceedings

THE COURT: Mr. Rogge, you and Mr. Murray come to the bench, and you gentlemen.

[Counsel for both sides approached the bench and conferred with the court in a low tone of voice as follows:]

THE COURT: I unfortunately this morning have a death sentence to impose. Do you want the jurors excused?

MR. GOLDMAN: It doesn't make any difference.

MR. MURRAY: I think it would be a good idea.

THE COURT: We usually do.

[Thereupon, counsel returned to the trial table and the following proceedings were had in open court:]

THE COURT: Ladies and gentlemen of the jury, we are going to excuse you for a few minutes with the following admonition:

That you are not to talk among yourselves with reference to this case at this time, nor are you to allow others to talk to you, nor are you to talk to others with reference to this case.

Similarly you will ignore any newspaper comments, or references if such there be to this case.

[The jury, as directed, left the courtroom, to return in fifteen minutes, at which time the following proceedings were had in open court:]

THE COURT: Suppose you gentlemen come to the bench.

[Counsel approached the bench and conferred with the court out of the hearing of those in the jury, as follows:]

THE COURT: What about this situation of pertinency, Mr. Rogge?

MR. ROGGE: I think the way to handle that is for counsel to sit down, and I think we can work that out, the difference in our positions. Mr. Murray submitted a stipulation to me which, at first glance, I found satisfactory, but I would much rather have the understanding, witness by

witness, and as I say, I am sure that if he and I sit down, as you suggest, after the close of court today, we sit down and work it out, because I am sure we can.

THE COURT: That means that part is out of the case, except for what you say. You will not have to deal with that in your opening statement, nor will Mr. Rogge.

MR. ROGGE: No.

MR. MURRAY: No.

THE COURT: That will relieve one possible chance of that getting into the case.

MR. MURRAY: I won't even mention the nature of the resolution.

THE COURT: We are dealing with a matter of law and pertinency.

MR. ROGGE: Right.

THE COURT: On the other hand, you can get out of that previous record all the testimony you want and 110 all he wants, and it will be the same question as before, with the points you may have preserved.

MR. ROGGE: Right.

MR. MURRAY: Before we proceed, I anticipate that Mr. Rogge and I will differ as to how much evidence I can show, as to the activities of the other persons—

MR. ROGGE: That is right.

MR. MURRAY: In this group?

MR. ROGGE: I don't think the activities of the other persons are relevant in the case of that defendant.

MR. MURRAY: I would like to get permission of the court to deal with it in a very general way in my opening statement.

Here is my view about it: I believe that we can show, not only what this individual herself did, and said, that is relevant to the charge, but also, that we can show activities of persons with whom she was associated, which, in the ordinary course of events, would have come to her notice.

And, we have here a situation where the power to produce records which were called for by the subpoena upon

her, and the others, did not reside in any single individual but resided in a group of which she was one. And we can show that that group appeared as a group, which of course they had to do, being subpoenaed for the same day, and acted pretty much the same way, and we think we have a right to show that.

THE COURT: On the theory of aiding and abetting it seems to me it would be pertinent to the situation.

MR. MURRAY: The way I propose to deal with this: In the opening statement I don't think I need go into detail; I should like to say this, however; that we expect to show, by the activities of this person and of others with whom she was associated, that it was within her power to do certain things to bring about a compliance with the subpoena and that she did not make use of what power was in her, and in cooperation with others who, together with her, could have produced them, she and they, by their combined action, refused to produce that which they could have produced.

MR. ROGGE: I would like to be heard on that for a few minutes.

THE COURT: Let me say this so you will have the benefit of it, Mr. Rogge:

My recollection is that in the testimony of certain of these witnesses who appeared before the Committee, they were stating specifically that, as advised, they had no right to make the presentation of these things.

In other words, that they were saying that they—don't hold me to the words because I don't remember them.

MR. ROGGE: I know that.

THE COURT: They couldn't do it, because they were but one of this Committee.

MR. ROGGE: That is correct.

112 THE COURT: And the Committee, as a whole, would have to do it.

So, if they were acting in unison in connection with that, or in concert, I think that would make for pertinency of what has been suggested.

I give you that for the benefit it may be.

MR. WOLF: They didn't say exactly that "or the Committee as a whole."

MR. ROGGE: I wonder if it would help to discuss this for five minutes out of the presence of the jury, but not at the bench? I have no objection.

THE COURT: I think we might as well finish it. We have lost almost a half hour.

MR. ROGGE: You get into the aiding and abetting, and just as I was lost before on the theory, I am lost with it again:

I mean—who is it claimed that Ernestina Fleischman aided and abetted? In what way?

I can't get any grasp of that.

The conspiracy theory is out of this case.

Who is it claimed that Ernestina Fleischman aided and abetted? In what way did she aid and abet them? I confess I was lost on the aiding and abetting conspiracy before your Honor before, and I am lost with it, now that Mr. Murray mentions it, again.

It is not in the indictment. Maybe it doesn't have to be, but,—I mean, I am just lost on this aiding and abetting theory, Judge.

113 MR. MURRAY: She aided and abetted the other members of the Committee, who aided and abetted her.

MR. ROGGE: In what?

MR. MURRAY: Refusing to produce records which they could have produced.

THE COURT: Well, I think we had better go ahead, gentlemen. My whole purpose in calling you up here was to mention the matter of pertinency.

MR. ROGGE: I think we can iron that out.

THE COURT: I think we will iron that out. I don't think we will sit here days, unnecessarily, in that matter.

As a matter of fact, this matter was continued from time to time. It was specifically at your request and with the understanding that you were going to go forward and make for expedition of this case.

MR. ROGGE: And I intend to do it.

THE COURT: And I am not going to say you are not.

MR. ROGGE: I intend to. The pertinency thing—maybe counsel should have sat down before now, but we haven't.

THE COURT: I am not concerned with whether you did it yesterday or today. All I would want to know is,—Is that going to be a stipulated thing so that it won't be paraded before the jury?—and I think that it is to your benefit that it not be.

MR. MURRAY: I should like to have Mr. Molenof associated with me from now on. I understand there is no objection.

114 MR. ROGGE: No objection.

[Thereupon, counsel returned to the trial table and the following proceedings were had in open court:]

THE CLERK: Remaining jurors may be excused until April 5, Monday morning, at 10:00 o'clock.

THE COURT: You may proceed, Mr. Murray.

MR. MURRAY: Thank you, your Honor.

Gentlemen of the jury, may I mention that Mr. Edward Molenof, Assistant United States Attorney, and I will be associated together in the prosecution of this case. Mr. Molenof was not here yesterday, but I take it, from your answers to the general questions, that you are not personally acquainted with him.

As you know, the prosecutor at the beginning of a trial, usually outlines the evidence the Government expects to rely upon, for proof of the charge, and I shall now do that as briefly as I can.

Ordinarily, it would have been done immediately upon your being sworn yesterday, but at the request of the Government and with the consent of the defense counsel, the

court permitted us to call the first witness so that he could go back to New York.

The charge in this case is what is usually referred to as Contempt of Congress, violation of Section 192 of Title 2 of the United States Code, and the provisions of 115 that pertinent to this charge are that, "It shall be unlawful for any person who, having been summoned to produce records upon a matter under inquiry by a Congressional Committee, wilfully to make default of that subpoena."

"Wilfully to make default of a summons to produce records" will be defined to you by the court at the end of this case, and I may say briefly, I think I can say it accurately, that the effect of the instructions will be that a person who intentionally refuses to produce records which he or she could produce, has made a wilful default of a summons, if that person has been summonsed to produce.

The indictment in this case is made up of two counts, but only the second count is before you, the first count having been abandoned by the Government.

However, there are introductory allegations in the first part of the first count which are incorporated into the second count and become a part of it, so I shall refer to that.

The indictment sets forth that the Joint Anti-Fascist Refugee Committee was an unincorporated association having its main office at 192 Lexington Avenue, New York City, and that the governing body of that organization was known as the Executive Board and that it was made up of a group of individuals who are named in that part of the indictment, 17 I think is the total, and one of those listed as a member of that governing body is this defendant, Mrs.

Ernestina G. Fleischman.

116 I might say that this case has already been disposed of as to the other named defendants and the present trial proceeds only as to her, Mrs. Fleischman.

The indictment then says that throughout a certain—

MR. ROGGE: If the court please, on the reference to "disposition of the other defendants," I ask that a juror be withdrawn and a mistrial be declared.

THE COURT: I will deny it. I thought the reference was very guarded, Mr. Rogge.

MR. MURRAY: I intentionally made it so.

THE COURT: Yes.

MR. MURRAY: The indictment says that during a period of time from October 1945 until April 1946 and a few days after that, the Committee on Un-American Activities of the House of Representatives was conducting a certain investigation, that it did so by virtue of authority given to it to do that in a resolution of the House of Representatives which is referred to as House Resolution 5 of the 79th Congress.

As the case goes to you, you will not be concerned with the nature of that investigation, and I only need say to you that the Government expects to introduce to the Court, out of your hearing, evidence which will cause the Court to instruct you that the investigation was one which the Committee of Congress had a right to make.

117 The indictment says that during the period mentioned, between October and April, this Congressional Committee was seeking to obtain access to records of the Joint Anti-Fascist Refugee Committee, and in pursuit of that information it issued certain subpoenas, one of which was a subpoena directed to Mrs. Ernestina G. Fleischman.

The indictment then alleges, and I am referring to the charging part of the second count, that the Executive Board, —so-called, that is the governing board of this association, of which this defendant was a member—had power to produce the records which the summons called for, and as I said, the court will instruct you, we expect, that the records which the Committee subpoenaed to be produced before it, were records which the Congressional Committee had a right to call for, and that it was acting within its jurisdiction in calling for them.

The indictment alleges that this Executive Board, governing as it did, the affairs of this organization, had the power to comply with that subpoena by producing the records, but it did not produce the records and in particular it says, in relation to this trial and this defendant,—“having with others, the power to produce, willfully made default.”

I have been referring now, to the charge and not to our proof. I shall refer briefly now to the evidence by which we hope to establish that this defendant is guilty as the indictment charges.

We will show that a few days before April 4th, 118 and I think it was on the date of March 29th, subpoenas were issued and one of them was a subpoena issued, directed to Mrs. Ernestina G. Fleischman. This subpoena was issued by authority of the Chairman of the Committee on un-American Activities at that time, who was Congressman John S. Wood, of Georgia. It was attested by the Clerk, John W. Carrington, and was placed in the hands of the United States Marshal in New York City for service, and was in fact served by a Deputy United States Marshal in New York, personally, upon this defendant, Mrs. Fleischman; that it required her to appear before the Committee on un-American Activities in Washington on April 4, 1946, and to produce before it the records which it called for, which I will not detail at this time.

We will show that Mrs. Ernestina Fleischman, and others, all being members of the governing board, appeared before the Committee on un-American Activities on April 4, 1946 in the city of Washington, District of Columbia, and failed to produce those records.

We will show that Mrs. Ernestina Fleischman knew that the Executive Board of which she was a member, and had been for four years possibly, had the power to direct the activities of that organization and therefore to produce these records; and we will show that they were not produced and that she knew they were not produced and that when we questioned about her own attitude about the

matter, she refused, or perhaps I should merely say, 119 failed to state, or rather, said that she was unable to say what her attitude would be.

Now, in addition to what I have stated about her own activities, we expect to show that other members of the Board, under circumstances which we will argue, certainly brought home to Mrs. Fleischman a knowledge of what they were doing, appeared before the Committee on that same date and took precisely the same attitude in relation to the records, and the production of them before that Congressional Committee,—failed to produce, and failed, even, to give a statement as to his or her attitude toward the Committee, or permit the Committee even to see the records in this city or in the offices where they were in New York City.

We will show that by a concert of action among the members of that Board, the summons which was issued for the production of those records, was unavailing and that the records were not produced and, as I say, it was in the power of this defendant and others, together to produce them and that this defendant and others, by a concert of action, took steps which made the production of them impossible, and thereby, deprived the Committee of those records and if we show those facts, we shall ask at your hands, at the conclusion of the case, a verdict of guilty as to this defendant, Mrs. Fleischman.

THE COURT: Mr. Rogge.

MR. ROGGE: I will reserve.

120 THE COURT: Very well.

Government's Case in Chief

MR. MURRAY: Mr. Carrington, please.
Thereupon,

John W. Carrington

called as a witness by the Government, having been first duly sworn, took the stand, was examined and testified as follows:

BY MR. MURRAY:

Q. Mr. Carrington, will you speak into that instrument when you answer, please? A. Yes, sir.

Q. I will get over here so you will be looking at me and talking that way.

Your full name is John W. Carrington? A. Yes, sir.

Q. You are a Clerk, are you not, sir? A. Yes.

Q. Of the Committee on un-American Activities? A. Yes, sir.

Q. You are now known as the Minority Clerk? A. Minority Clerk, at the present time.

Q. When the majority in the House was Democratic, you were a Majority Clerk, is that what you called it?

A. Yes, sir. That is correct.

121 Q. Now, at that time, I am referring now, specifically, to the latter part of 1945, from October to December, 1945, and from January 1946 through April of 1946, were you Majority Clerk of the Committee on un-American Activities of the House of Representatives?

A. Yes, sir.

Q. Who was Chairman during that same period? A. Congressman John S. Wood.

Q. Of Georgia? A. Yes, sir.

Q. Do you know his handwriting? A. Yes, sir.

[Government's Exhibits Nos. 1 and 1-A were marked for identification only, previously.]

BY MR. MURRAY:

Q. I show you Government's Exhibit for identification 1, and ask if you are able to identify that paper? A. Yes, sir.

Q. Is that signature to which I have pointed, "John S. Wood," the signature of the Chairman, Congressman Wood, of Georgia? A. Yes, sir, that is it.

Q. On the left, is your name in writing? Is that your own signature? A. Yes, sir.

122 Q. I show you Government's Exhibit 1-A. Can you identify that? A. Yes, sir.

Q. Now, there is in handwriting the name "John S. Wood." Do you know whose handwriting that is? A. No, sir.

Q. It is not Congressman Wood's? A. I don't believe it is, no, sir.

Q. And this other name, "John W. Carrington," is that your signature? A. No, sir.

Q. Do you know who did write it? A. It looks pretty much like the Secretary's handwriting.

Q. And who is the Secretary? A. Miss Joray.

Q. Joe— A. Mrs. Paul Joray.

Q. She was Secretary to you, was she? A. Yes, sir.

Q. Are you able to say whether 1-A is a carbon copy of the white one? A. Yes, sir.

Q. Now, I will ask you whether these papers were issued by authority of the Chairman, to your knowledge? A.

Yes.

123 MR. ROGGE: Just a minute. I object. This witness can't state whether this was issued by authority of anyone. That calls for a conclusion and I ask that it be stricken.

THE COURT: By "authority" you mean "direction," sir?

MR. MURRAY: Perhaps I should use that expression. May I withdraw that question?

THE COURT: Yes.

MR. MURRAY: And pursue it in a more detailed question?

THE COURT: Yes.

BY MR. MURRAY:

Q. Mr. Carrington, do you know about the issuance of that subpoena? A. Yes.

Q. And do you know who directed that it be issued? A. The Chairman.

Q. Congressman Wood did direct that it be issued? A. Yes, sir.

Q. And did he give those directions to you? A. Yes, sir.

Q. And did you cause them to be written? A. Yes, sir.

Q. Do you know who was directed or instructed to serve or make service of this paper? A. If my mind serves me right, I think it is a matter of record that two of the investigators went to New York and the 124 arrangements were made with the Marshal there, I presume.

Q. Of course you were not with them? A. I was not with them.

Q. You say that only from information? A. I just offer that.

Q. Were you present when they were directed by anybody connected with the Committee to go to New York? A. I don't recall that I was present when they were.

MR. MURRAY: I offer Government's Exhibit 1 and Government's Exhibit 1-A in evidence, if the court please.

MR. ROGGE: Mr. Carrington, these documents which I have—marked Government's Exhibits 1 and 1-A for identification—they were never handed to the Sergeant-at-Arms, were they?

THE WITNESS: I do not recall.

MR. ROGGE: Nor were they handed to any of his special messengers, were they?

THE WITNESS: I do not recall.

THE COURT: You don't know whether they were or not?

THE WITNESS: No, sir.

MR. ROGGE: If your Honor please, I object to these documents on the grounds that they are not subpoenas because they are simply requests to the Sergeant-at-Arms, or his special messengers, to issue subpoenas, and apparently subpoenas were never issued; also that no proper foundation has been laid for them.

125 THE COURT: I will receive them, sir.

[Government's Exhibits Nos. 1 and 1-A for identification were received in evidence.]

MR. MURRAY: I will read them at this time.

THE COURT: Very well.

MR. MURRAY: I am reading now Government Exhibit No. 1, which has been received in evidence.

May I strike out the "for identification" after it, and I will do likewise on the 1-A?

I will just read one, because, as you have heard, this one is a carbon copy of the original:

"By authority of the House of Representatives of the Congress of the United States of America, to the Sergeant-at-Arms or his special messenger:

"You are hereby commanded to summons Mrs. Ernestina G. Fleischman—'The Voice of Fighting Spain,'—1 Columbus Avenue, New York City, a member of the Executive Board of the Joint Anti-Fascist Refugee Committee, to be and appear before the un-American Activities Committee of the House of Representatives of the United States, of which the Honorable John S. Wood is Chairman, and to bring with you all books, ledgers, records and papers relating to the receipt and disbursement of monies by or on account of the Joint Anti-Fascist Refugee Committee, or any subsidiary or subcommittee thereof, together with

126 all correspondence and memoranda of communications by any means whatsoever with persons in foreign countries, the said books, papers and records demanded herein are for the period from January 1, 1945, up to and including the date of this subpoena," and then, continuing—"in their chamber in the City of Washington, on April 4, 1946, at the hour of 10 a. m., then and there to testify touching matters of inquiry committed to said committee; and she is not to depart without leave of the said committee.

"Herein fail not and make return to this summons.

"Witness my hand and the Seal of the House of Representatives of the United States, at the City of Washington, this 29th day of March, 1946.

"John S. Wood, Chairman.

"Attest: John W. Carrington, Clerk."

And on the back of it are certain blanks that were not filled in, which I will omit; and on the bottom it says: "Served on Mrs. Ernestina G. Fleischman in person at No. 1 Columbus Avenue, New York, New York, on March 29, 1946, James E. Mulcahey, United States Marshal, S. D., New York, by Thomas G. Farson, Deputy."

The stamp is on the back which says, "Received. United States Marshal." "United States Marshal, New York." There is a clock arrow pointing across to "2" and underneath that there is a stamp dated "March 29, 1946, p. m."

BY MR. MURRAY:

Q. Mr. Carrington, are you able to say how those in writing, "John S. Wood," and "John W. Carrington," on the pink copy, got there? Do you know how that was done,—why it was done? A. Well, this was sent, to the best of my recollection, to the printer, and to have this show the signatures on that when it was printed.

Of course, this document was signed to correspond with the original.

Q. Is it your recollection that the two signatures on this copy were not on it when it was put in the hands of the investigators, together with the original? A. I don't believe it was, because it wasn't customary to sign it.

Q. Mr. Carrington, were you present when a group of individuals connected with the Joint Anti-Fascist Refugee Committee appeared before the Committee on un-American Activities on April 4, 1946? A. Yes, sir.

Q. Just where were you when the group appeared?

MR. ROGGE: If the court please, I object on the ground that what other people did has no relevancy here. We are interested in this defendant.

THE COURT: I am not in a position to tell what is coming right now, but you may proceed at this point, sir.

BY MR. MURRAY:

128 Q. Where was that, sir? A. Well, it was in the office rooms of the House un-American Activities Committee in the Old House Building.

Q. Where is that? A. That is on Pennsylvania Avenue, Northeast, across the Avenue from the Library of Congress.

Q. That is in the District of Columbia? A. Yes, sir.

Q. Do you remember the room number in that House Office Building? A. I believe it was 537 and 536. We had those two rooms there.

Q. What floor of the building was that? A. Fifth floor.

Q. Do you remember, of your own independent recollection at this time, what members of the Committee were there?

THE COURT: By "Committee" you mean Congressional—

MR. MURRAY: Committee on un-American Activities.

THE WITNESS: Members of the Congressional Committee?

BY MR. MURRAY:

Q. Yes, sir. A. I don't believe I could name all of them. It is a matter of record.

Q. Do you remember whether Chairman Wood was there? A. Yes.

129 Q. You do know that? A. Yes, sir.

Just where were you in relation to the room where the Congressional Committee held its hearing? A. I was in the Clerk's room.

Q. That was a different room? A. Different room, yes.

Q. Was it— A. At times I was in and out of the Committee Room, but only performing the duties of the Clerk. The room was small and we had a room full of people.

Q. Do you know Mrs. Fleischman by sight, Mr. Carrington? A. Yes.

Q. Do you see her here today? A. Yes, sir.

Q. Can you recall whether she was one of the group that appeared on April 4, 1946? A. Yes.

Q. You saw her there? A. Yes, sir.

Q. Did you see her go in the Committee Room? A. Yes.

Q. And come out? A. Yes, sir.

MR. MURRAY: Mr. Clerk, will you mark those with the next Exhibit numbers?

130 [Papers heretofore referred to were marked Government's Exhibits Nos. 2 and 2-A through K inclusive, for identification only.]

MR. MURRAY: I can go to something else, possibly, while the Clerk is doing that, if the court please.

THE COURT: All right.

MR. MURRAY: However, I think I had better wait, because that is about what I wanted to inquire into.

BY MR. MURRAY:

Q. Mr. Carrington, I show you a group of papers, pretty much alike in appearance, on legal sized, thin paper, with red ink margins on the left and right, which have just been stamped Government's Exhibits Nos. 2 and 2-A, and so forth, through to 2-K, a group of papers, Government 2 to 2-K for identification, and ask you whether you saw those papers on April 4, 1946?

THE COURT: Did you ask him when?

MR. MURRAY: Whether he saw them on April 4, 1946.

THE WITNESS: Yes, sir.

BY MR. MURRAY:

Q. Did you see them all together, or singly, or how, when you first saw them? A. I don't recall whether they were handed to me all together or not, but I had the papers, of course; as custodian of the records at that time, they came to my hands.

131 Q. Now, were they handed to you by somebody connected with the Committee? A. Yes.

Q. Do you remember who it was? A. The attorney for the Committee had the papers.

Q. You mean Mr. Adamson? A. Yes, sir.

Q. And he gave them to you? A. Yes, sir.

Q. Was that on the same day? Do you remember that it was the same day this group appeared, that Mrs. Fleischman was one of? A. Yes, sir.

Q. When was it? What time of day was it in relation to the time the hearing was held? A. It was in the afternoon.

Q. When did that hearing begin, that day of April 4, before the Congressional Committee? A. It was set for 10:00 o'clock, if my memory serves me right—at 10:00 o'clock in the morning.

Q. Was there an afternoon session in addition to the morning one? A. To the best of my recollection, it went through the day,—went through a portion of the day.

Q. Was it at the conclusion of the whole hearing,—the conclusion of the session in the afternoon that you 132 got this group of papers? A. That is my recollection. Yes, sir.

MR. MURRAY: That concludes the direct examination, if the court please.

I shall not offer these at the moment.

Cross Examination

BY MR. ROGGE:

Q. Mr. Carrington, referring to 1-A again, will you just trace their physical custody for me? Congressman Wood signed them and then you signed them, is that right? A. Yes, sir.

Q. And then, you think it is Mrs. Joray who signed 1-A, and then they were handed directly to the investigators of the Committee, weren't they? Remember? A. I wouldn't say that, because I had no jurisdiction over them after I drew the paper—had the paper drawn and signed it. I don't know whether it was left with the Committee. I am just speaking from recollection of the case, rather than to say positively who handed the papers to the investigator,—I wouldn't know.

Q. You mean to tell us that you don't remember whether you handed those to the investigator, or handed them back to Congressman Wood? A. No, sir. I wouldn't say. I don't remember.

Q. Well, you do this rather frequently, don't you?
133 A. I did at that time, yes.

Q. What was your practice at that time?

THE COURT: I don't think we are concerned with the practice, sir. I think it is what he did,—if he knows.

BY MR. ROGGE:

Q. Well, isn't it a fact that you handed these to the special investigators for the Committee? A. No, sir.

Q. Do you know who the special investigators were?
A. Yes.

Q. Who were they? A. The names of the men who handled those papers, to the best of my recollection, were: Mr. Russel, and Mr. McDavitt.

Q. Isn't it a fact that either you or Congressman Wood handed these documents to either one of those two gentlemen? A. That could be.

Q. Do you know? A. I have no recollection of handing them to them myself, because I wasn't the Chief Investigator.

MR. ROGGE: No further questions.

THE COURT: You may step down.

MR. MURRAY: May Mr. Carrington be excused?

THE COURT: Is that agreeable?

MR. ROGGE: That is agreeable.

[The witness was excused.]

134 MR. MURRAY: At this time I should like to offer in evidence two resolutions of the House, and an extract from The Journal.

MR. ROGGE: No objection.

THE COURT: They will be received.

[Government's Exhibits Nos. 3, 4, and 5 for identification were received in evidence.]

THE COURT: Are you marking those?

MR. MURRAY: These have been marked. House Resolution 2, of the House of Representatives, has been marked Government's Exhibit 3. House Resolution 5 has been marked Government's Exhibit 4; and the transcript from The Journal of the House of Representatives has been marked Government Exhibit 5.

With the court's permission I shall refer to them briefly to the jury, if I may.

The Government Exhibit 3 simply—well, I will read it.

"House of Representatives of the United States: January 2, 1945 resolved that a message be sent to the Senate to inform that body that a quorum of the House of Representatives assembled; that Samuel Rayburn, Representative from the State of Texas, has been elected Speaker; South Trimble, a citizen of the State of Kentucky, has been elected Clerk; and that the House is ready for business. Attest: South Trimble, Clerk.

"House Resolution 5, dated January 5, 1945,"—and I will describe it by saying that this is the Resolution 135 which authorized the Committee on un-American Activities of the House of Representatives to make the investigation which it was making when the events occurred that we are trying at this time.

Government's Exhibit 5 is an extract from The Journal of the House of Representatives and I shall read:

"I, South Trimble, Clerk of the House of Representatives, do hereby certify that the following members constitute the Committee on un-American Activities of the House of Representatives, as is evidenced in The Journal of the House of Representatives of January 16, 1945, page 71; January 25, 1945, page 89; July 12, 1945, page 529; John S. Wood, Chairman, of Georgia; John E. Rankin, of Mississippi; J. Hardin Peterson, of Florida; J. W. Robinson, of Utah; John R. Murdock, of Arizona; Herbert C. Bonner, of North Carolina; J. Parnell Thomas, of New Jersey; Karl E. Mundt, of South Dakota; and Gerald Landis, of Indiana. In witness whereof I hereon affix my name and seal in witness, Washington, District of Colum-

bia, this second day of August, Anno Domini, 1946. South Trimble, Clerk, House of Representatives" and seal of the House.

THE COURT: Mr. Rogge, will you and Mr. Murray come forward, please?

[Thereupon, counsel approached the bench and the following proceedings were had without the hearing of those in the jury:]

THE COURT: I don't know whether you gentlemen have gotten together or not, but I have anticipated 136 from what you have done, you are going to get the stenographer who took this stuff. We went through all the rigmarole heretofore, and with the same papers.

I am not trying to anticipate what you are doing, but if it is the same routine, let's see if we can't do something about it.

MR. MURRAY: I am going to attempt, through Mr. Adamson—I understand he is not here yet—to bring out certain of the events that happened on that day, without use of the transcript, and as to the testimony of this witness,—I am going to ask him certain parts of it.

THE COURT: I didn't bring you up to make you tell everything, but, as a matter of fact, what I am concerned about is if we have formal things we have been over, don't let's do it again. That is my thought. I may be wrong. I thought with the stenographic record, if the stenographer comes down once and initials it, you showed it to him once—to bring him back would result in a—

MR. ROGGE: I am willing to shorten that to this extent:

I do want to bring out that the man destroyed his notes.

MR. MURRAY: His notes?

THE COURT: The same thing is in the previous record. It certainly should be stipulated into this one.

MR. MURRAY: I will stipulate it.

MR. ROGGE: If that may be stipulated, I will 137 consult as to whether we might stipulate it.

THE COURT: I don't think you gentlemen want to sit here and go through something we have gone through before, if you can preserve your record.

MR. ROGGE: I understand from Mr. Murray that he is going into other things with Mr. Adamson.

I can say to your Honor that on this formal proof, if Mr. Murray will stipulate it go in the way it was proved before, speaking for myself, and I will discuss that over the noon hour with my associates—I will—

THE COURT: You may not want to go that far.

MR. MURRAY: I am perfectly willing to stipulate everything said or done in the previous trial that the defense will stipulate.

I am desirous of doing it in the interest of time.

I forget what I told Mr. Adamson. I may have told him he could safely come at a later hour than it now is.

THE COURT: Do you have something else, or is that all?

Suppose we recess for ten minutes and see what happens in the meantime.

[Thereupon, counsel returned to the trial table and the following proceedings were had in open court:]

THE COURT: Gentlemen of the jury, and alternate member,—the court is going to recess at this point for a period of ten minutes, and it does so with the same admonition heretofore given.

In other words, you are excused for a period of ten minutes.

[Following the taking of a brief, informal recess, the hearing was resumed.]

MR. MURRAY: Mr. Adamson, please.
Thereupon,

Ernie Adamson

called as a witness by the Government, having been first duly sworn, took the stand, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q. Mr. Adamson, you are Ernie Adamson? A. That is right.

THE COURT: Keep your voice up, please, so everybody can hear you.

BY MR. MURRAY:

Q. Are you an attorney, sir? A. Yes.

Q. And in what city do you reside at this time? A. Pittsburgh,—a suburb of Pittsburgh.

Q. Were you counsel for the Committee on un-American Activities of the House of Representatives at any time?

A. Yes, sir.

Q. Will you state the period that you were?

139 A. It was from about the end of March, 1945 until January 1st, 1947. It was during the years 1945 and 1946.

Q. And were you counsel for the Committee when Mrs. Fleischman and others were summoned to appear before the Committee? A. Yes. I believe she was one of a group.

Q. Do you know Mrs. Fleischman by sight? A. Yes. That is the lady sitting there. [indicating.]

Q. I show you Government's Exhibit 1 and Government's Exhibit 1-A. Are you able to identify them?

A. Well, the white paper is an original of a subpoena signed by the Chairman, Judge Wood, and countersigned by Mr. Carrington, the Clerk of the Committee.

The piece of pink paper is the carbon of the original subpoena.

Q. Were you personally present when the Chairman gave directions as to the service of this paper? A. I was.

Q. What were the directions? That is, what directions did he give as to who should serve it? A. Well, he called me and two of the investigators, and I believe there were quite a number of these subpoenas—15 or 16 of them—and

he directed these two investigators to take the subpoenas, go to New York, and to enlist the service of the United States Marshal's Office in order to get them served promptly.

140 Q. Did you later see this white paper at any time subsequent to when the Chairman gave those directions? A. Oh, yes. They were returned by the Office of the United States Marshal in the Southern District.

Q. Returned, by mail, you mean? A. Yes, with the returns endorsed upon each one of the subpoenas.

Q. Mr. Adamson, the subpoenas called for the appearance of Mrs. Fleischman on April 4, 1946. Did she and the others in the group appear on that day? A. Yes.

Q. I will ask you: Did you understand her to be connected with the Joint Anti-Fascist Refugee Committee?

MR. ROGGE: What this witness understood is not material. The fact is he has no personal knowledge.

THE COURT: All right, sir.

BY MR. MURRAY:

Q. Mr. Adamson, were you familiar with the attempt which the Committee on un-American Activities was making to obtain access to the records of the Joint Anti-Fascist Refugee Committee?

MR. ROGGE: I object. That is immaterial,—what attempts they were making. We have a specific case and certain specific alleged subpoenas.

The COURT: I will permit that question.

141 BY MR. MURRAY:

Q. Just answer that yes or no. That is a preliminary question, sir. A. Yes.

Q. Were you familiar with their efforts? A. Yes.

Q. I will ask you to state, if you know, who was the first person connected with that organization who appeared before the Congressional Committee in response to a subpoena directing the production of records of that organization?

MR. ROGGE: Just a moment. I object to that. The question says "connected with that organization." It assumes something that isn't in the evidence in this case, and as to which this witness does not have personal knowledge.

THE COURT: What is the question?

MR. MURRAY: Shall I repeat it?

THE COURT: Yes.

MR. MURRAY: I am asking this witness who was the first person connected with the Joint Anti-Fascist Refugee Committee who appeared before the Congressional Committee in response to a subpoena to produce the records of the organization.

MR. ROGGE: I object to that because the question assumes something that is not in evidence and as to which this witness does not have personal knowledge. If he wants to ask whether a certain person appeared on a certain date—

142 THE COURT: You may ask a preliminary question, if you will, Mr. Murray.

BY MR. MURRAY:

Q. I will ask this question, Mr. Adamson:

State, if you know, when the first subpoena was issued by the Congressional Committee calling for the production of records of the Joint Anti-Fascist Refugee Committee.

MR. ROGGE: I object. That has no relevancy.

THE COURT: I will overrule the objection.

THE WITNESS: As I recall, Mr. Murray, the first subpoena was issued way back in December.

THE COURT: What year?

BY MR. MURRAY:

Q. What year? A. Of 1945.

Q. When did the person appear, if anyone did, in response to that subpoena? A. Well, two individuals actually appeared prior to the time that Mrs. Fleischman and the group appeared. That was Miss Helen Bryan and Dr. Barsky.

Q. I was asking about who appeared in response to this first subpoena issued in December, 1945. A. I believe there was a postponement at one time, but subsequently, Miss Bryan appeared, and then, of course, Dr. Barsky appeared.

143 Q. Do you remember when Miss Bryan appeared?

A. That must have been around the 24th or 25th of January.

MR. ROGGE: May I preserve the objection to this whole line of questioning, on the ground of irrelevancy. We have here a transaction that has nothing to do with this case.

THE COURT: On the ground of irrelevancy,—yes.

BY MR. MURRAY:

Q. It was around January 24 or 25, 1946? A. Yes.

Q. That Miss Bryan appeared?

THE COURT: I didn't get that date, sorry.

MR. MURRAY: January 25 or 24, 1946.

THE COURT: Yes.

BY MR. MURRAY:

Q. You say Miss Helen Bryan appeared? A. Yes.

Q. Were the records produced on that occasion? A.

No.

Q. Was another subpoena then issued for the production of those records? A. Yes. I think Dr. Barsky was called.

Q. Did he appear in response to a subpoena calling for the production of the records of the Joint Anti-Fascist Refugee Committee? A. Well, he appeared, but he didn't produce the records.

Q. When did he appear? A. That was in February. That would be about the middle of February.

Q. Of the same year, 1946? A. Oh, yes; and it was subsequent to his appearance that Mrs. Fleischman was called.

Q. And that appearance appears from here to be the 29th of March, 1946,—that this subpoena on her was issued. Right? A. Yes, sir.

Q. Now, when did you first see the pink copy of the subpoena issued to Mrs. Fleischman after it was first issued and left the Committee of Congress? A. Mrs. Fleischman had it with her when she appeared.

Q. Did you participate in the hearing of the Committee on un-American Activities on April 4, 1946? A. Yes. I conducted the examination of Mrs. Fleischman.

Q. On that occasion, were there others heard by the Committee also? A. Oh, yes, the other members of the group.

Q. How many persons altogether, according to your present recollection, appeared before the Committee on that day? A. Well, I think there were about 16, Mr. Murray.

Q. This hearing was in the House Office Building 145 in Washington, was it not, sir? A. Yes, In the room of the Committee.

Q. On that occasion, were the records called for in the subpoena issued on Mrs. Fleischman produced by her? A. No, sir.

Q. Were those records produced before the Congressional Committee by anybody on that occasion? A. No, sir.

Q. Were the records described in that subpoena on Mrs. Fleischman ever produced by anybody before the Congressional Committee? A. Not to my knowledge, no, sir.

Q. I show you, Mr. Adamson, a group of papers, which have been marked Government's Exhibits 2 and 2-A through 2-K, and including, of course, 2-K, and ask you whether you recognize those papers? A. Well, these statements were identical—

THE COURT: You do recognize them, sir, or not?

THE WITNESS: Yes. They were brought in at the time of the hearing on April 4th and Mrs. Fleischman had one of them.

BY MR. MURRAY:

Q. Are you able to identify in that group the particular

one that Mrs. Fleischman produced? A. Well, except for the notation on it, I couldn't, because these all looked exactly alike.

Q. Were those papers produced by various individuals? A. Yes, sir.

Q. Did anyone produce any more than one copy?

A. No.

THE COURT: On the same date of April 4th, sir?

THE WITNESS: Yes, sir.

MR. MURRAY: I offer in evidence, if the court please, Government's Exhibits 2 to 2-K inclusive.

MR. ROGGE: I object. In the first place, Judge, there is not sufficient foundation as to these documents; and in the second place, as to relevancy, aside from the one that Mrs. Fleischman handed in.

THE COURT: You are objecting to them on the ground of relevancy?

MR. ROGGE: Yes, and also—

THE COURT: Also what?

MR. ROGGE: That there is no proper foundation laid for them, sir.

THE COURT: In what particular?

MR. ROGGE: He doesn't say who handed in which particular one. He hasn't said that, aside from stating that one was handed in by—

THE COURT: Come to the bench.

[Thereupon, counsel approached the bench and the following proceedings were had without the hearing of those in the jury:]

MR. ROGGE: You can't use the statement of one person against another.

147 As a matter of fact, they were all handed in, as I recall from the previous record, separately and out of the presence of each other. I think your Honor agrees that what one person says, out of the—

THE COURT: I agree on the basic problem, sir. I wonder if it is applicable in this situation?

I understand that any admission made by one, out of the presence of another, is not binding on the other; but where the situation that exists—whether the rule is applicable—

MR. MURRAY: We can't bind ourselves to what you and the Court know transpired in the first case.

MR. ROGGE: I know that, your Honor, for the purpose of this case, aside from—I mean, counsel must cooperate so that we don't waste anybody's time; but aside from that, I know your Honor will disassociate from your mind,—for the purpose of this case, you will disassociate from your mind what happened before, and on that basis, this material isn't admissible, except the one sheet.

If he can identify the sheet that Mrs. Fleishman handed in,—that one,—I can't make that objection to it; but certainly I can as to all the others.

THE COURT: What have you to say, Mr. Murray?

MR. MURRAY: I say that we have here an act showing concert among a group of persons who, we will show by other evidence, were members of the Executive 148 Board, the controlling Board. They are producing identical papers. One of those papers, it has been testified to, has been produced by this particular defendant.

I think we have the right to show what that statement was, that this particular defendant had produced, and show the fact that others also presented like statements; and we can show that concert by the conduct of individuals having—drawing no part from what they said about it, but only from their conduct.

THE COURT: I think that is right. The question occurring to me at the present time is whether he can show who these people were who gave the papers, and what their connection was with the case.

MR. MURRAY: We haven't, yet.

THE COURT: That is what the court has in mind.

MR. MURRAY: Perhaps I had better withhold the offer until I do that.

MR. WOLF: Wouldn't that, in effect, be a direction—

MR. ROGGE: Just a minute—

THE COURT: I will listen to you.

MR. WOLF: I think the court indicated there was a lack of foundation, but I think there is a further objection.

THE COURT: What is the further objection?

MR. WOLF: These statements with regard to anyone but the persons making them are hearsay, and they 149 can't possibly bind the defendant.

They were statements made out of the presence of the defendant—

THE COURT: I will come back to that, sir; but if you show that, Mr. Murray—

MR. MURRAY: Very well.

[Thereupon, counsel returned to the trial table and the following proceedings were had in open court:]

MR. MURRAY: If the court please, the only part of the questioning I planned for this witness was in relation to certain portions of the testimony of this defendant before the Congressional Committee.

Now, if permitted to at this time, I should like to read from the transcript. I shall make the stipulation that was indicated in connection with that at this time, if that is desirable.

THE COURT: Suppose you gentlemen come back to the bench.

[Thereupon, counsel approached the bench and the following proceedings were had without the hearing of those in the jury:]

MR. ROGGE: I am willing to make the stipulation, but want it in the presence of the jury, and also want to say that he testified on cross examination about the destruction of his notes. All I want to do is stipulate exactly what transpired before. I mean, I will stipulate that he would

testify, if called, that his is an accurate transcript, 150 but I also want the record to show that he did not,— well, I would rather refer just to the record so that

I may state it accurately, and want to state it in the presence of the jury; but I am agreeable to stipulating that.

MR. MURRAY: I understand that. I will state that in the stipulation.

THE COURT: What are we talking about?

MR. MURRAY: Your Honor has it. It begins at page 38, just as we discussed it before.

THE COURT: There were certain things marked out before.

MR. MURRAY: Certain portions ought not to be read.

THE COURT: Do you have the marked copy? You will recall, Mr. Rogge, that we eliminated certain things?

MR. ROGGE: Right.

THE COURT: "Are you a member of the Communist Party?"

"You haven't heard the question yet. Are you a member of the Communist Party?" And it goes on down.

MR. ROGGE: There was some before that, I think; wasn't there?

THE COURT: No, sir.

MR. WOLF: Page 39.

MR. ROGGE: I thought we left that out.

THE COURT: We left it out before, because there had been no question raised about that. I am willing to leave that out, although the jury said they would have no 151. prejudice against it. Whatever your pleasure is,— Leave it out!

MR. WOLF: It is immaterial.

MR. ROGGE: Leave out, beginning with Mr. Adamson, "Are you a citizen of the United States," down to "Mrs. Fleischman, at New York City," That is right.

THE COURT: Are you going to leave out the "citizen of the United States?"

MR. ROGGE: I would like to have that in, yes.

THE COURT: What is your feeling, Mr. Murray?

MR. MURRAY: I think it ought to be out, or put the whole thing in.

THE COURT: I think that is all right.

MR. ROGGE: All right.

THE COURT: You would rather have it all out?

MR. ROGGE: Right.

MR. WOLF: Is this not the result of the discussion at the previous trial?

THE COURT: Over on 41, sir, starting out—

MR. WOLF: Do you want us to state the objections we have, on the ground of relevancy?

THE COURT: Let's see if we can get what we did last time, for instance, on 41, the part where I was reading, starting off, "Are you a member of the Communist Party?"

That has nothing to do with this situation.

152 Are you following, Mr. Murray?

MR. MURRAY: I am afraid I am not.

THE COURT: It seems to me, I haven't read all this—it is marked, apparently, at 41,—starting "Are you a member of the Communist Party?" I struck down all that page and over to the 42nd,—where it says, "I repeat, that is not pertinent."

MR. MURRAY: I have that marked out, too, as this must be from the previous hearing.

THE COURT: Then on 43, down at the bottom, "Mr. Adamson: Under what name were you naturalized?" and I had that marked to come out, down to "Ernestina is the name," on 44, and then I started down, after 39—

I can't read my notes on here, now.

Down to "in that capacity belonged to the Board."

MR. ROGGE: That part, I don't know what it means below there.

THE COURT: I have a mark there, too.

"It was a movement in Spain." etc.

MR. MURRAY: I don't follow that. On page 44?

THE COURT: Page 44, sir. I came down here to "Ernestina is the name," and then we leave in two questions and answers, and then we take out "Mr. Adamson" down to—I am confused there.

MR. ROGGE: I think we struck practically everything on 44 except a couple of sentences.

THE COURT: "Well, I was a member. I got to 153 go to the Committee meetings."

MR. ROGGE: I am not prepared for that.

THE COURT: I don't know what that means. I will strike that, unless you have some objection.

MR. ROGGE: And the rest, to the end.

THE COURT: Let's see if we are talking about the same thing here.

What I would have then, would leave in "Mr. Adamson: How long have you known Dr. Barsky? "Mrs. Fleischman: I knew him in New York since, I think it was 1939."

And then, "Mr. Adamson: Who asked you to belong to the Board?" "Well, I was a member. I got to go to the Committee meetings, Mr. Chairman."

MR. ROGGE: That is agreeable.

MR. MURRAY: You mean the other?

THE COURT: I am talking about 44.

MR. MURRAY: And the rest is out from "Mr. Chairman," on?

THE COURT: That is what I have marked. I will be honest—

I will let you read if you want.

MR. MURRAY: That is all right with me.

MR. ROGGE: For the sake of the record, all this, of course, is subject to our objection that this is not admissible under Section 634 of Title 28. That is the point we made before.

THE COURT: That is the immunity statute?

MR. MURRAY: Yes.

154 MR. ROGGE: All Mr. Wolf wants is to state something.

MR. WOLF: I think 634 is not immunity, but makes the testimony incompetent. I don't want to argue—

THE COURT: All I am asking is: is that the same thing we ruled on before?

MR. WOLF: Right.

Now, with regard to relevance, I think instead of making our objection down below—

THE COURT: Yes.

MR. WOLF: Starting with page 40—the testimony on page 40 after the single space, typed, through all the testimony on 41 that hasn't yet been stricken out, is objectionable on the ground of irrelevancy. It has nothing to do with whether they produced papers or not. It deals with who prepared the statements, who produced the statements.

THE COURT: I will overrule that.

MR. WOLF: Now, on page 42, all except the statement, "and you are a member of the Executive Board of the Joint Anti-Fascist Committee?"

"Yes, Mr. Chairman."

THE COURT: Where is that?

MR. WOLF: A third of the way down.

THE COURT: This is 42?

MR. WOLF: 42.

A little further down:

155 "And you are a member of the Executive Board of the Joint Anti-Fascist Refugee Committee?"

"Yes, Mr. Chairman."

All but that, and a few lines down below:

"How long have you been a member of the Executive Board?"

"Since 1942, I think."

"And that is when the Committee was first organized, is it?"

THE COURT: Yes.

MR. WOLF: Yes. All the rest on the page is objectionable on the ground it is irrelevant to this proceeding.

Similarly, everything which is not crossed out on page 43, which you have not already ruled on, has nothing to do with the issues in this case.

THE COURT: Why do you say it has nothing to do with the issues, sir?

MR. WOLF: Because what, for instance—the testimony with regard to how the Executive Board of the organization, or what power the Executive Board has, has no bearing on whether Mrs. Fleischman produced the books and records in response to a subpoena served upon her, what she would do if they held a meeting, what she would do in the future cannot possibly have any bearing.

I assume your Honor will make a ruling with regard to willfulness.

156 THE COURT: I am bound to make that now.

MR. WOLF: The only important thing is whether her actions were deliberate and intentional and under your ruling—

THE COURT: What she would do in the future may or may not go to the question of her good or bad faith, but that is ruled out as an issue in the case.

MR. WOLF: For that reason, I think all the material on 43—

MR. MURRAY: One moment,—

MR. WOLF: May I finish?

MR. MURRAY: Surely.

MR. WOLF: The material on page 44, with reference to Dr. Barsky, "How long have you known him?"

THE COURT: Yes.

MR. WOLF: I think is also irrelevant and request that be stricken.

THE COURT: Have you heard what has been stricken?

MR. MURRAY: Only in a vague way, but I do believe that there is a portion on 42 which we do not have a right to use. That is where the Chairman recites to her in a question what Dr. Barsky had said.

THE COURT: I am not following you, sir.

Let me say to you gentlemen this:

What I have indicated here is just my fragmentary—I am not saying—you gentlemen follow me because my markings may not be accurate. I am just relying on what I had, subject to check by you.

What are you saying now?

MR. MURRAY: The lower part of page 42:

"The Chairman: Dr. Barsky was served some time ago."

MR. ROGGE: I thought that was already out.

MR. MURRAY: Is it out?

THE COURT: I haven't even found it.

MR. MURRAY: Page 42, about Dr. Barsky. Is that out?

MR. WOLF: Apparently not.

MR. MURRAY: I agree it ought to go, if you want it out.

MR. WOLF: I think that points up the statement we are just making about relevancy, in relation to a meeting at which she was not present.

How far down would you go with that, Mr. Murray?

MR. MURRAY: Through 42 and including the first line of 43.

May I say this, that if counsel wants her denial in there, I am not saying it ought to go out. I am just offering to exclude it if counsel moves to have it excluded.

MR. ROGGE: I think our position as to that is—we are taking no position.

THE COURT: Oh, no. You will take a position one way or another.

MR. MURRAY: I will read it, if you don't take a position.

THE COURT: You can't be fish and fowl, too.

158 Do you desire that that part be left, sir?

MR. ROGGE: May I put it this way, sir? We have objected on the ground of it is not admissible under Section 634 of Title 28. We are not making an additional objection on the grounds of relevance.

MR. MURRAY: We are now—

MR. ROGGE: That is the one we argued—

THE COURT: The appropriateness of the introduction of any of the testimony, is that right?

MR. ROGGE: That is right.

THE COURT: And there is no objection to this part of it, Mr. Murray, as I understand you gentlemen, except for the—

MR. MURRAY: I will read it.

THE COURT: Their objection was on the theory that none of this was admissible under the—

MR. MURRAY: Immunity statute, yes.

Otherwise, they make no objection.

THE COURT: That is right.

MR. ROGGE: I think we should have the stipulation in the record for the jury.

THE COURT: What is the stipulation?

MR. MURRAY: I shall stipulate that if the reporter who took these proceedings were produced as a witness, he would say that the transcript from which I am about to read is a correct transcript; but he would also say that

the notes, stenotype notes, which he made of it were 159 destroyed by him in April or May, 1947.

MR. ROGGE: After the indictment was returned.

MR. MURRAY: After this indictment was returned. THE COURT: You stated nothing more than that, because of the necessity of space, or something like that.

MR. MURRAY: Oh, yes, because he didn't have room for them.

THE COURT: All I want to know is how far you gentlemen want to go. I haven't read it.

MR. ROGGE: I have been reading—

THE COURT: I recall he did state that.

MR. MURRAY: They and other notes were destroyed.

MR. ROGGE: If you are going into other notes, the other notes all related to the Joint Anti-Fascist Refugee Committee.

MR. MURRAY: You had better point that out. That is not my recollection.

THE COURT: Can't we say this, can you gentlemen not agree what was in this record that relates to the sub-

jeet? You may use the part you want, and use the part he wants in your argument to the jury, by virtue of the stipulation.

MR. MURRAY: That is all right with me.

THE COURT: In other words, all you want to get is a true picture, as I understand it.

160 MR. ROGGE: We would stipulate that the testimony of Smith, that he would testify—give the same answers to the same questions that he did when he was testifying before.

He would testify this was an exact record.

I would like to have brought out at the same time, because it would have been brought out at the same point, about the destruction of the stenotype notes.

MR. MURRAY: Oh, yes.

MR. ROGGE: And thereafter either party may refer to questions and answers of this witness as if he had been called and given the same questions and answers.

[Thereupon, counsel resumed their places at the trial table and the following proceedings were had in open court:]

MR. MURRAY: May it please the court, and gentlemen of the jury: I am about to read from a printed transcript of the testimony of this defendant, Mrs. Fleischman, before the Committee on un-American Activities of the House of Representatives on April 4, 1946. This printed transcript is the result of certain work, the transcription of notes of a stenotype reporter named Howard B. Smith, who had for some years been reporting work at the Capitol. He has offices in the Mills Building.

It is stipulated by counsel and with the approval of the court, without calling Mr. Smith as a witness here, that if he were called as a witness he would testify that he took down on his stenotype machine, the proceedings of the hearing which I am about to read to you, and that he caused his notes to be transcribed into typewritten form 161 and later compared with the printed transcript, from which I am about to read, with his notes by going

over them; but that the notes are now no longer in existence because sometime, I think I may say, in April or May, probably 1946, a time after this particular indictment was returned in the court, the notes of this, together with other notes of his which had accumulated in the office, were thrown away to make room in his office for other files.

Mr. Rogge has reminded me of an error in the stipulation as I put it:

I said that Mr. Smith would say he had compared this printed transcript with his notes. That is not correct. What he compared were his stenotype notes with the manuscript which was written under his direction, which manuscript later was sent over to the Printer, resulting in this print; but he didn't then compare this printing with his notes.

Mr. Smith has previously given testimony under oath regarding this matter, and a printed transcript of that is in possession of counsel and it has been agreed, in connection with what I told you, that either side may make further references to that printed transcript of Mr. Smith's testimony in arguing as to the accuracy, if we do, of this transcript.

May I ask the Clerk to please mark this?

[The pamphlet referred to was marked Government No. 6 and received in evidence.]

MR. MURRAY: I am reading from a pamphlet, a printed transcript which is in evidence, marked Government's Exhibit 6, in evidence for the limited purposes indicated.

Reading from page 38 of that volume—

THE COURT: Wouldn't it be better to put the question to him, sir, and then let the other one answer?

MR. MURRAY: Yes, sir.

THE COURT: Do you have an extra copy?

MR. ROGGE: I think I would object to that.

THE COURT: I will overrule your objection in the interest of the jury. I think they are entitled to have it in

clear-cut fashion. Would you like to take one of the records and either ask the questions or give the answers?

MR. ROGGE: No, Judge.

MR. MURRAY: I will probably have to mark this one likewise.

THE COURT: All right.

MR. MURRAY: Perhaps I can—

THE COURT: If it will save time the other way, all right.

MR. MURRAY: What?

THE COURT: Go ahead. You may just read it, then.

MR. MURRAY: I will read questions and answers, also, then.

“Testimony of Mrs. Ernestina G. Fleischman, New York City

“[The witness was duly sworn by the chairman.]

“Mr. Adamson: Will you give your name and your residence address to the reporter?

“Mrs. Fleischman: Ernestina G. Fleischman, 1 Columbus Avenue, New York City.

163 “Mr. Adamson: And what business or profession are you engaged in, Mrs. Fleischman?

“Mrs. Fleischman: None. No business.

“Mr. Adamson: And you are here in compliance with a subpoena served upon you by this Committee calling for the production of the books, papers, and records of the Joint Anti-Fascist Refugee Committee? Is that correct?

“The Chairman: You will have to speak up so we can hear you. You were asked if you are appearing here under a subpoena served on you. Were you? Did you have a subpoena served on you?

“Mrs. Fleischman: Yes.

“The Chairman: Have you got it with you? [The witness produced the subpoena.]

“Mr. Adamson: I offer this as part of the testimony of this witness, Mr. Chairman.

“The Chairman: Let it go in.

"[The subpoena served on Mrs. Ernestina G. Fleischman follows:]

"Copy, By Authority of the House of Representatives of the Congress of the United States of America,

"To the Sergeant-at-Arms, or His Special Messenger:

"You are hereby commanded to summon Mrs. Ernestina G. Fleischman, "Voice of Fighting Spain," 1 Columbus

164 Avenue, New York City, a member of the executive board of the Joint Anti-Fascist Refugee Committee,

to be and appear before the Un-American Activities Committee of the House of Representatives of the United States, of which the Honorable John S. Wood is chairman, and to bring with you all books, ledgers, records, and papers relating to the receipt and disbursement of money by or on account of the Joint Anti-Fascist Refugee Committee or any subsidiary or subcommittee thereof, together with all correspondence and memoranda of communications by any means whatsoever with persons in foreign countries. The said books, papers and records demanded herein are for the period from January 1, 1945 up to and including the date of this subpoena, in their chamber in the city of Washington, on April 4, 1946, at the hour of 10 a. m., then and there to testify touching matters of inquiry committed to said committee; and she is not to depart without leave of said committee.

"Herein fail not, and make return of this summons.

"Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 29th day of March, 1946.

"Attest: John S. Wood, Chairman. John W. Carrington, Clerk."

"Mr. Adamson: You are here in answer to that subpoena? Is that correct?

"Mrs. Fleischman: Yes.

"Mr. Adamson: Have you produced here today the books, papers, and records that were called for by the subpoena?

165 "Mrs. Fleischman [reading]:

"I individually do not have possession, custody, or control over any of the material requested in the subpoena which was served upon me. The books, records, and correspondence of the Joint Anti-Fascist Refugee Committee are in the possession, custody, and control of Miss Helen R. Bryan, the executive secretary of our organization, and she is the legal custodian of this material. Since I do not have either in my possession, custody, or control the books, records, and documents described in the subpoena, I am unable to comply with your order to produce them."

"Mr. Bonner: How many times have you read that over before?"

"Mrs. Fleischman: I don't remember."

"Mr. Bonner: Just approximately how many? Six or eight?"

"Mrs. Fleischman: Two or three times."

"Mr. Landis: Did you write it? Did you write the statement yourself?"

"Mrs. Fleischman: I don't think it is pertinent."

"Mr. Bonner: She is like the others."

"Mrs. Fleischman: May I consult my lawyer?"

"Mr. Bonner: You don't need to. I am not going to ask you any legal questions."

"Mr. Landis: You ought to know whether you wrote it or not if that is your statement, whether somebody gave it to you or whether you wrote it. You should know that."

"Mrs. Fleischman: I have to ask to consult my lawyer."

166 "The Chairman: All the other witnesses have testified that an attorney by the name of Wolf prepared this statement. Do you conform with that?"

"Mrs. Fleischman: Attorney Mr. Wolf. He is the attorney."

"The Chairman: We have the statements that all of them have brought in here so far. They are the same as you make. They are all identical, so the same party must have prepared them all."

"Mrs. Fleischman: Well, I think I should like to consult my lawyer.

"Mr. Bonner: I want to ask you one more question, then I am not going to ask you anything further. You all got together and had these statements distributed to you when you were in a little group together?

"Mrs. Fleischman: Can I consult my lawyer about that?

"Mr. Bonner: It don't make any difference what your lawyer says.

"Mr. Mundt: You know whether that is true or not.

"Mrs. Fleischman: I should like to consult my lawyer.

"Mr. Bonner: You have got a good mind. I can see that. You can remember whether he handed this to you individually or whether you got together in a group.

"Mrs. Fleischman: I like to consult my lawyer.

"Mr. Bonner: I think you have got just as much sense as he has. You don't need to answer the question if 167 you don't want to.

"Mrs. Fleischman: I need legal advice.

"The Chairman: You mean you need legal advice to determine what the truth is?

"Mrs. Fleischman: I like to consult my counsel about it.

"The Chairman: For you to determine what the facts are?

"Mrs. Fleischman: No; I want to consult my counsel.

"The Chairman: For what purpose?

"Mrs. Fleischman: For the purpose of what the gentleman asked me.

"The Chairman: But what do you want to ask your lawyer.

"Mrs. Fleischman: Will you repeat the question?

"The Chairman: I want to know what you want to ask your lawyer. The question was if that statement was prepared by Mr. Wolf?

"Mrs. Fleischman: Well, I want to consult my lawyer on that.

"The Chairman: Don't you know?

"Mrs. Fleischman: I should like to consult my lawyer.

"The Chairman: Don't you know?

"Mrs. Fleischman: I should like to consult my lawyer.

"The Chairman: If you know, you don't need to consult your lawyer.

"Mrs. Fleischman: I want to consult my lawyer. Physically I didn't write the statement.

"The Chairman: You didn't write it?

168 "Mrs. Fleischman: I didn't write it physically, but I would like to consult my lawyer.

"The Chairman: That is all we want to know, whether you wrote it or not.

"Mr. Landis: Who gave you this statement?

"Mrs. Fleischman: I should like to consult my lawyer.

"The Chairman: About what?

"Mr. Landis: About who gave it to you?

"Mrs. Fleischman: I should like to consult my lawyer.

"Mr. Mundt: What about?

"Mrs. Fleischman: About the things you have asked me.

"Mr. Thomas: I will ask you a question you won't need to consult your lawyer about. You won't have to consult your lawyer on this because only you know the answer.

"Mrs. Fleischman: I should like to consult my lawyer."

Your Honor, I would like to have permission to read her last answer, without going into what it was in response to.

THE COURT: Show it to Mr. Rogge, sir.

MR. ROGGE: All right.

MR. MURRAY: Beginning on page 42:

"Mrs. Fleischman: I repeat that is not pertinent.

"Mr. Bonner: What is your definition of the word 'pertinent'?

"Mrs. Fleischman: Pertinent is for the question, to my

knowledge, which is not very large in the English language,

I say pertinent, when a question does not fit to the
169 case, when that is not going to the case, it is not
pertinent.

"The Chairman: Let me ask you a question that
is pertinent. Dr. Barsky is the chairman of your board,
isn't he?

"Mrs. Fleischman: Yes.

"The Chairman: And you are a member of the executive
board of the Joint Anti-Fascist Refugee Committee?

"Mrs. Fleischman: Yes, Mr. Chairman.

"The Chairman: And Dr. Barsky is chairman of that
board?

"Mrs. Fleischman: Yes—I beg pardon!

"The Chairman: Dr. Barsky is chairman of that board?

"Mrs. Fleischman: Dr. Barsky is chairman of the committee.

"The Chairman: Of the Joint Anti-Fascist Refugee Committee?

"Mrs. Fleischman: Yes.

"The Chairman: How long have you been a member of the executive board?

"Mrs. Fleischman: Since 1942, I think.

"The Chairman: And that is when the committee was first organized, is it?

"Mrs. Fleischman: Yes.

"The Chairman: Dr. Barsky was served some time ago with a subpoena by this committee of Congress to produce these records that are being called for by us, that you are being called upon to produce, and he appeared before this committee and testified that the executive board of the

170 Joint Anti-Fascist Refugee Committee had had a meeting and that the matter was laid before them, and that they voted unanimously to decline to this committee permission to inspect those books and records. Were you present at such a meeting as that?

"Mrs. Fleischman: What meeting do you refer to?

"The Chairman: The meeting at which the subpoena that was served on Dr. Barsky some month or two ago was discussed and acted on by your executive board. Were you present?

"Mrs. Fleischman: I was not present.

"The Chairman: Did you participate in the matter by telephone or in any other manner?

"Mrs. Fleischman: I did not.

"Mr. Landis: You did not vote?

"The Chairman: You did not vote on it at all, one way or the other?

"Mrs. Fleischman: I did not vote.

"The Chairman: You took no action on it one way or the other?

"Mrs. Fleischman: I did not vote.

"The Chairman: Mrs. Fleischman, this executive board of the Joint Anti-Fascist Refugee Committee is the authority that controls the policies and actions of that organization, is it not?

"Mrs. Fleischman: That is correct.

"The Chairman: There isn't any other authority higher than the executive board?

171 "Mrs. Fleischman: No.

"The Chairman: And on all matters of policy, direction of the activities of the Joint Anti-Fascist Refugee Committee, the executive board is the highest authority?

"Mrs. Fleischman: Yes.

"The Chairman: Now, as a member of that board—you say you are a member now?

"Mrs. Fleischman: Yes.

"The Chairman: As a member of that board are you willing, so far as you personally are concerned, as a member of that board are you now willing to permit this committee of Congress to see those books and records called for in that subpoena?

"Mrs. Fleischman: I don't know what I would do. It would require a meeting of the board.

"The Chairman: Would you now, right here now, give your consent to this committee to let them do that?

"Mrs. Fleischman: I don't think that is pertinent.

"Mr. Landis: That is the main thing, the whole case.

"The Chairman: And for that reason you won't answer?

"Mrs. Fleischman: I don't think it is pertinent. I think the board has to take action. It would be wrong for me to express an opinion, because the board has to decide.

"The Chairman: Mrs. Fleischman; I am going to ask you now for your personal permission. I am requesting you personally to permit this committee of Congress 172 to have access to those books. Will you give it to us or not? So far as you are able to do, will you give it to us?

"Mrs. Fleischman: That is expressing my opinion, Mr. Chairman. I cannot say what the board will do.

"The Chairman: I am not asking what the board will do. I am asking what you will do.

"Mrs. Fleischman: I do not know, because the thing comes to the board to discuss, and I don't think it is pertinent to say what I should do a week from now. It is a special meeting."

Page 44:

"Mr. Adamson: How long have you known Dr. Barsky?

"Mrs. Fleischman: I knew him in New York since, I think it was 1939.

"Mr. Adamson: Who asked you to belong to the board?

"Mrs. Fleischman: Well, I was a member. I got to go to the committee meetings, Mr. Chairman."

That concludes the reading from Government Exhibit 6. I have read from that part of the exhibit included between pages 38 and 44.

BY MR. MURRAY:

Q Mr. Adamson, as you heard that testimony read, do you remember it, generally speaking? A Yes.

Q I will ask whether among, and reserve your answer until the court rules if there is objection, I will ask 173 you whether among the groups of individuals who appeared before the Congressional Committee on that occasion, of April 4, 1946, whether anyone of that group stated to the Committee in answer to the Committee's question, whether he or she would consent to permitting the Congressional Committee to examine the records of the Joint Anti-Fascist Refugee Committee?

MR. ROGGE: Object to that.

THE COURT: Let me ask you, preliminarily, Mr. Rogge and Mr. Murray, what group are you speaking of, sir?

MR. MURRAY: The group appearing before the Committee on April 4, 1946.

MR. ROGGE: I object to it on various grounds.

THE COURT: Let me finish, please. I am trying to find out where we are.

MR. ROGGE: Sorry.

THE COURT: Is it limited to the members of this Joint Anti-Fascist Committee, sir?

MR. MURRAY: Their identity as such comes from their own testimony. That is, so far, in the Government's showing.

THE COURT: I think they ought to be identified, if you can identify them as members before we go into that.

MR. MURRAY: I will withdraw that question at this time, if the court please; and I have no others at the moment.

I think your Honor may be adjourning anyhow.

174 May I leave my direct examination open in the event I do think of anything.

THE COURT: I don't think we will start, it is 28 minutes past.

Gentlemen, I am going to have to stay out until 2:00 o'clock, so I will call that particularly to your attention and you may be advised and make such plans as you want for that purpose.

You, too, members of the jury: We are going to recess to return at 2:00 o'clock, and do so with the same admonition heretofore given, not to talk to anyone about the case, or permit anyone to talk to you about the case, nor are you to talk among yourselves with reference to this case nor read anything in the newspapers pertaining to it or listen to any radio comment, if such there be, with reference to the case.

With that, you are excused to return at 2:00 o'clock.

[Thereupon, at 12:30 o'clock p. m., the hearing stood in recess until 2:00 o'clock p. m. that same day.]

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Afternoon Session

[Following the taking of the usual luncheon recess, the hearing of the above-entitled matter was resumed at 2:00 o'clock p. m. as follows:]

MR. MURRAY: May I ask that Mr. Adamson be excused for a moment, and call another witness out of turn?

MR. ROGGE: That is agreeable. Of course, you understand I have my right of cross examination?

THE COURT: Of course.

MR. MURRAY: I think it would be preferable that he wait in the witness room.

THE COURT [addressing Mr. Adamson]: Mr. Witness, the court instructs you to talk to no one about this case, nor to permit anyone to talk to you about the case.

[The witness, thus admonished, retired to the witness room.]

MR. MURRAY: Mr. Secrest, please.
Thereupon,

William G. Secrest

called as a witness by the Government, having been first duly sworn, took the stand, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q Mr. Secrest, will you please—

THE COURT: Is that Mr. Secrest?

176 MR. MURRAY: Sorry, sir.

BY MR. MURRAY:

Q State your full name. A William G. Secrest.

Q S-e-c— A c-r-e-s-t.

Q What is your position? A Assistant Clerk, United States Court of Appeals.

Q Have you produced records of that court here? A I have. [passing certain paper writings to counsel.]

MR. MURRAY: Your Honor, I was just about to ask our Clerk to make a mark, but I do not believe we could do that in view of the fact that these are records of another court.

At this time, may I state to counsel that I am going to ask the witness first—I will ask the witness first:

BY MR. MURRAY:

Q Are these papers that I now show you, which have on them, I will state for purposes of identification, "36-A, 36-B and 36-C", are they records at present part of the files of the United States Court of Appeals for the District of Columbia? A Yes.

MR. MURRAY: I wish to offer those in evidence at this time.

MR. ROGGE: If the court please, I want to be heard on this.

177 THE COURT: Do you know what they are?

MR. ROGGE: Yes, sir, I know what they are.

THE COURT: I haven't seen them.

MR. ROGGE: Shall we approach the bench?

THE COURT: Yes.

[Thereupon, counsel approached the bench and the following proceedings were had without the hearing of those in the jury:]

MR. ROGGE: Your Honor will recall those were produced by Miss Helen Bryan in the other case. In other words, these are documents which were admitted in evidence over our objection in another case, but that is not this case.

THE COURT: It is what?

MR. ROGGE: It is not this case. It has absolutely not the slightest foundation laid for introduction here.

I never heard of a proceeding where you introduced documents in another case by simply bringing them in here, and all he would have to do is simply come in here with the records and offer no witnesses at all.

MR. MURRAY: Much of what Mr. Rogge says is correct. I don't want to represent to the court that I think we have laid the entire foundation.

I have a statement to make when he has finished.

THE COURT: All right, sir. I am just going through them [examining certain documents].

178 All right, what do you say, Mr. Murray?

MR. MURRAY: Here is my statement, if the Court please:

As long as objection has been made to all three, I will concede that the Constitution and By-Laws, is that one of them?

THE COURT: I don't get that.

MR. MURRAY: I will concede that the resolution, I guess it would be, or motion, adopted by the organization on December 14, advising its Chairman and Executive Secretary to advise with attorneys, and so forth, and the action of the organization reflected in its resolution or minutes for February 11, 1946—I concede that those actions not having been shown to be participated in by this defendant, are of doubtful relevancy.

As to the third, I do offer that to show who were in fact members of the Executive Board.

Now, here is my position in relation to that: I do not concede that by proving that they are part of the Court of

Appeals records, that by proving that this document is a part of the record of the Court of Appeals, I do not of course say that that makes it admissible in this case. I do say that its relevancy is beyond question, that we have the right to show who were the members of the Executive Board.

Now, the only way that I could think of to prove the authenticity of this document would be to call upon 179 Miss Bryan, and if I couldn't get her, possibly somebody else; but everybody that I know who could prove it is also a convicted member of the Board, or Miss Bryan, who has yet to be prosecuted, and that consideration, plus some more practical ones such as being involved a much longer time than I thought would be in a case previously concluded before this, contributed to make me pass up the duty I probably had of putting a subpoena on Miss Bryan. I believe if she were produced here, she would have to say, just as she did in the previous trial, that this is a record of the organization and a list of its Directors.

MR. ROGGE: I can say to your Honor that if Miss Bryan is called again, she is going to claim privilege. She has a case coming up. Just because the Government has indicted everybody, that is the Government's difficulty and not mine.

My objection remains and Mr. Murray concedes, in effect, that there is no foundation laid as to any of the documents, and as to those two, the additional one of irrelevancy, and absolutely no foundation laid for these documents, that remains.

I am not only going to rest on it, but urge it upon your Honor because I don't think the Government can prove this case.

MR. MURRAY: Do you concede that that is a record of the organization?

MR. ROGGE: No, sir.

MR. MURRAY: I will have to have Miss Bryan here. I don't think she can claim her privilege. She turned it down—

180 MR. ROGGE: I don't think she has. I think you have no proof on that. I don't think the Government can prove its case.

THE COURT: Are you stating that this has no relevancy, is that your basis here?

MR. ROGGE: As to this?

THE COURT: Yes.

MR. ROGGE: No foundation.

MR. MURRAY: The question was your opinion as to its relevancy.

MR. ROGGE: You are getting an aiding and abetting theory I don't understand. You are going into this aiding and abetting. I am just as confused on aiding and abetting as I was at the trial, but I say if this is going to be a record of the Joint Anti-Fascist Refugee Committee, you will have to bring somebody here to identify that and I don't have anyone here who can. They will all have to be brought here.

MR. MURRAY: If the court will continue this case long enough, I will bring 16 here, most of whom can't claim privilege that I am aware of.

THE COURT: That is the part that disturbs me. It is a question of delay as to that part, because those who have been tried and convicted certainly can't claim Constitutional right.

MR. WOLF: That would mean a new trial.

MR. ROGGE: It is not my fault that the gentle-
181 men indicted all these people.

THE COURT: Not your fault, Mr. Rogge, but let me say to you, when you asked for all the continuances, you repeatedly said to the court that you were going forward with the case and make it a matter susceptible to dispatch.

MR. ROGGE: That is right, and I want to say to the court that I have already stipulated as to the shorthand reporter. After court, I am going to sit down and stipulate as to pertinency. But, I also had in mind this point that the Government won't be able to prove this case, because they have indicted everybody, and I also have made up my mind a long time ago that when these trials came on, if Helen Bryan was subpoenaed she could claim her privilege. She should have claimed it the last time. I don't think the Government can prove its case. As a matter of fact, to show you how my thinking goes, I long ago had a memorandum prepared that she has not waived privilege, so I am not trying—this is not for the purposes of delay—it is because I do not think the Government can prove a case.

I am willing to stipulate everything else. I have already told Mr. Murray that. I have stipulated to some things this morning. I will stipulate more this afternoon, but even with all my stipulations—

THE COURT: Couldn't one—

MR. MURRAY: Mr. Rogge has not stipulated a single thing except as to the stenographer.

182 MR. ROGGE: I will stipulate pertinency, as I told you.

MR. MURRAY: The very day we discussed the last continuance, I put in the mail to Mr. Rogge the stipulations that I understood we had agreed upon, and sent them to him and haven't heard a word from him since, by mail.

MR. ROGGE: Is that as to pertinency?

MR. MURRAY: That is right.

MR. ROGGE: I have had that up with Mr. Wolf, who wants to make the stipulations.

That stipulation in its present form is even now agreeable to me if Mr. Wolf, who is associate counsel will agree. I mean, even the form of the stipulation is agreeable to me, but that isn't going to help on this.

I never agreed to stipulate as to that, and cannot, because I don't think the Government can prove a case here.

MR. MURRAY: It is just the same situation as existed before the Committee.

This organization has the power, when the last subpoena was issued, that subpoena was not directed to Miss Bryan, it was directed to the organization and they sent Miss Bryan down, who was already under a separate indictment, had her come in and take the stand. She identified this document. That is one of the records of the organization. She didn't have to come. They could have designated somebody else.

183 MR. ROGGE: This happens to be crucial, Judge, I think, in this particular case; and I have thought for a long time that no matter what the decision in the Court of Appeals was, the Government still could not prove this case and I don't think they can.

I will stipulate everything else except this, and I cannot stipulate this.

THE COURT: All this shows is who the members of the Committee were.

I will not receive it at this time while Mr. Rogge makes that objection, Mr. Murray; because I think we have to show who these people are.

MR. MURRAY: May I have this understood, if the court please:

I should like to return that document to Mr. Secrest and let him take it back to the court.

THE COURT: Yes.

MR. MURRAY: May this be understood, that if at a later time the court should receive this document in evidence, we may make use of a copy of it which is in the printed record.

THE COURT: Do you have objection?

MR. ROGGE: I have no objection to that.

THE COURT: Very well.

[Thereupon, counsel returned to the trial table and the following proceedings were had in open court:]

184 MR. MURRAY: May Mr. Seerest be excused?
THE COURT: If there is no objection, he is excused.

[The witness was excused.]

MR. MURRAY: Will your Honor allow me to step out of the court room for about one minute?

THE COURT: Yes.

[Government counsel left the room momentarily.]

MR. MURRAY: Mr. Adamson, please.

Thereupon,

Ernie Adamson

having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

BY MR. MURRAY:

Q Mr. Adamson, you have testified as to the subpoenas that were issued by the Congressional Committee to which Miss Bryan responded in January and Dr. Barsky responded in February, and you have also testified about Mrs. Fleischman's appearance before the Committee in response to a subpoena on April 4, 1946.

I will ask you if you can give us the names of the other persons beside Mrs. Fleischman, that were subpoenaed by the Congressional Committee to appear before it on April 4, 1946, and produce records of the Joint Anti-Fascist Refugee Committee relative—

MR. ROGGE: I again raise my objection to relevancy, if the court please.

185 THE COURT: I will deny it, sir.

THE WITNESS: I can name some of them, off hand from memory.

BY MR. MURRAY:

Q If you will do that, please, sir. A I would have to see the transcript to refresh my recollection, probably, as to some of them; but I recall the name of Weinstein, Lustig, Chodorov, Magana, Fast.

Q I think I shall now ask, if I may, whether you recall these names specifically?

Do you remember Dr. Jacob Auslander? A Yes.

Q A Professor Lyman R. Bradley? A Yes.

Q Do you remember Mrs. Marjorie Chodorov? A That is right.

Q And Howard Fast? A That is right.

Q And Leverett Gleason? A That is correct.

Q Harry M. Justiz? A Yes.

Q Mrs. Samuel Kamsley? A Yes.

Q Mrs. Ruth Leider? A Yes.

186 Q James Lustig? A Yes.

Q Manuel Magana? A Yes.

Q Dr. Louis Miller? A Yes.

Q Herman Shumlin? A Yes.

Q Mrs. Charlotte Stern? A Yes.

Q Dr. Jesse Tolmach? A Yes.

Q Mrs. Bobbie Weinstein? A Yes.

Q You have stated that Miss Bryan, Helen R. Bryan, appeared before the Committee in January. Did she appear also on April 4th? A I believe she did.

Q Mr. Adamson, did the subpoenas directed to all those individuals whom you have named, call, as did the one for Mrs. Fleischman, call for records of the Joint Anti-Fascist Refugee Committee?

MR. ROGGE: Object to what this witness states as to other documents that are not present here contained, no proper foundation, but I think the documents 187 themselves would not be relevant here.

THE COURT: If he has personal information I think he may state it.

MR. ROGGE: I object. It is not the best evidence, if the court please.

THE COURT: All right, sir.

THE WITNESS: The subpoenas were prepared under my direction and they were identical, so far as I know. I looked at them all before they went out. To the best of my knowledge I believe they were identical.

THE COURT: By "identical" you mean as to each one of the persons you enumerated?

THE WITNESS: As to the demand for the production. Of course the names and addresses would be different as to each.

BY MR. MURRAY:

Q Were they identical as to Government's Exhibit 1, which I show you? A Yes.

Q In the respect indicated, that is, what they call for? A The language reading, "and to bring with you."

Q They were identical in that respect? A Yes, sir.

Q When you say the language "and to bring with you," you mean that part of the subpoena beginning with those words? A Yes, sir, and the following language describing the material to be produced.

188 Q Did the Committee on Un-American Activities issue any other subpoenas before or after April 4, 1946 than those that have been enumerated by you? A You mean as against—

MR. ROGGE: Again I don't know what difference it makes whether they did or did not. I object.

THE COURT: Do you mean pertaining to this matter, sir?

MR. MURRAY: Calling for the records that these subpoenas called for.

BY MR. MURRAY:

Q Did they issue any other subpoenas subsequent to April 4, 1946? A I think you have mentioned all the subpoenas that were issued in connection with this particular group here.

Q Yes, sir? A That is, the Joint Anti-Fascist Refugee Committee.

Q Mr. Adamson, did Miss Bryan, when she appeared on April 4, produce the records called for? A No, sir, she did not.

MR. MURRAY: Your Honor, before I ask this question, may I be heard at the bench?

THE COURT: Yes.

Step down, Mr. Adamson, for a moment.

189 [Thereupon, counsel approached the bench and the following proceedings were had without the hearing of those in the jury:]

MR. MURRAY: I propose to ask Mr. Adamson this question: whether the other members of the group were asked by the Committee what would be their attitude about permitting the Committee, the Congressional Committee, to see the records. If he answers that they were asked such a question, I will ask whether any of them stated what would be his or her attitude in that regard.

THE COURT: That is while he was there, sir?

Take, for instance, Dr. Barsky, Mr. Bradley, all of these: You mean, while he was present?

MR. MURRAY: While he, the witness was present.

MR. ROGGE: I shall object to that because that is out of the presence of the defendant, and as a matter of fact, I can show your Honor your own ruling and charge to the jury which makes that material inadmissible as to this defendant. What took place between this witness and somebody else, out of the presence of this defendant, is not admissible against her.

THE COURT: Against her?

MR. ROGGE: That is right.

THE COURT: You have a different situation here, Mr. Rogge. What actually transpired in this case was whether or not these records were produced, the contention being by this person that she could not produce them because she was a member of the group.

190 MR. ROGGE: He has already asked this witness whether any of the others produced any of those records, and he has gotten his answer; but he is now

going into what they stated, and I say to your Honor that what any of these people stated out of the presence of this witness would be admissible only if there were established a conspiracy among all and what was done was in conspiracy. There is no such case.

What counsel wants to go into now is a conversation that took place out of the presence of the defendant, for the purpose of trying to bind her and the law just does not permit it.

Counsel pointed out to me that the question related, and I think this makes it even worse, as to what they would do in the future, it makes it all the more objectionable; but what you are going into, you are going into a conversation between other people to which the defendant was not a party, was not present, for the purpose of binding her and you just cannot do it, Judge.

Your Honor might say, "Well, now, did they produce any records?" I think he could ask that. He has. That is in the record, but no one produced any record.

Now, we are going into a conversation and it just cannot be done.

THE COURT: Do you have anything to say, Mr. Murray?

MR. MURRAY: My argument in favor of the admissibility, or the propriety of this question is that it will bring forth evidence of a concerted action on the part of 191 that group, of which the defendant was one. I do not intend to go into the recital that each individual made in stating his or her attitude. I simply want to show that they have the same attitude in the sense that I would show that they had the same color of hat on if that were the fact.

MR. ROGGE: Whenever you open the door like that, you can go into all the things that were said, on the same basis and I just call to your Honor's attention—

THE COURT: Let me ask you, Mr. Murray: What is the specific question you want to ask now?

MR. MURRAY: It would be about a series of maybe three questions like this:

Did this defendant, Mrs. Fleischman—

No, first: Was Mrs. Fleischman asked what would be her attitude toward permitting the Committee to see the records?

THE COURT: That is in.

MR. ROGGE: That is already in.

MR. MURRAY: If it is objected to as repetitious, possibly that would be all right.

THE COURT: Yes.

MR. MURRAY: Were the other members of this group who appeared on that day asked by the Committee what would be their individual attitude toward permitting the Committee to see the records of the organization?

THE COURT: I will deny that at this time.

192 MR. MURRAY: Very well, sir.

[Thereupon, counsel returned to the trial table and the following proceedings were had in open court:]

BY MR. MURRAY:

Q Mr. Adamson, do you recall whether this group of individuals who appeared on that day were called before the Committee in any particular order? A I don't recall that any particular order was predetermined. I think they were called in the order that I happened to have them on a piece of paper.

Q Now, what members of the Committee on Un-American Activities were present at the hearing on April 4, 1946? A Well, I knew the Chairman was present, Judge Wood. I remember Mr. Mundt was present. I remember Mr. Thomas was present. I remember Mr. Rankin was present. Mr. Bonner was present. Mr. Landis was present.

I do not recall whether Mr. Peterson, Mr. Murdock and Mr. Robinson were there the whole day or not. One might have come in for a little while and then gone out.

Q Were these witnesses heard one at a time? A Yes,

sir, they were all heard individually and in executive session.

Q Did they have counsel, to your knowledge, on that day?

MR. ROGGE: This is personal knowledge, I take it!

THE COURT: Yes, if you know.

193 THE WITNESS: Yes. I remember seeing Mr. Wolf and spoke to him casually. I think he informed me that day that he was there for that—

MR. ROGGE: I object to that. He is about to go into a conversation between himself and Mr. Wolf.

THE COURT: You did see Mr. Wolf there, did you?

THE WITNESS: Yes, sir.

THE COURT: All right, sir.

BY MR. MURRAY:

Q Mr. Adamson, you were shown a group of papers like the one I am holding in front of you now, Government's Exhibit 2? A Yes, sir.

Q Were those papers produced by the group of individuals whose names you have given in answer to questions?

A Yes, sir.

Q Did anyone produce more than one such paper? A No, I don't believe they did.

Q What is your present recollection as to how many of the group that appeared before the Committee on that day produced papers such as the one I showed, Government 2?

THE COURT: I understood him to say that all produced them.

MR. MURRAY: I don't recall.

THE COURT: I may have made a mistake.

BY MR. MURRAY:

194 Q Have you said anything about that before in your present testimony, now or before? A My recollection is that all or nearly all of them did, and I know Mrs. Fleischman did because I recall her reading from the statement.

Q Where was Mr. Wolf during the hearing? A Mr. Wolf was out in the ante-room.

Q Did you see Mrs. Weinstein before she came in as a witness?

MR. ROGGE: I object. It is not material whether he did or did not.

THE COURT: I will admit it.

THE WITNESS: I saw them all, Mr. Murray, before the hearing; because they were all gathered out in the ante-room, and I had occasion to walk through several times.

BY MR. MURRAY:

Q Was Mrs. Fleischman with the group of individuals whose names you have given? A Yes, she was there.

Q When did you first arrive at the hearing room, or ante-room that morning? Do you remember? A I don't recall the exact time, about 8:30 I suppose.

Q Do you recall when you first saw Mrs. Fleischman? What hour, I mean? A No, I couldn't remember that.

195 MR. MURRAY: I believe that concludes the direct examination, if the court please.

Cross Examination

BY MR. ROGGE:

Q Mr. Adamson, Congress was in session on April 4th, was it not? A I believe it was.

Q And members of this Committee went to the floor of Congress from time to time, didn't they? A Most of them remained in the Committee room.

Q As a matter of fact, there was one point of time where they all went to the floor, didn't they? A Oh, yes.

Q Now, you are not going to tell us at what particular time Congressman Wood got there on this particular day, are you? A Congressman Wood was right there on the job.

Q You also mean to tell us that Congressman Rankin was there during the time that Mrs. Fleischman was before that group? A I can't recall whether he stayed during her entire examination or not, Mr. Rogge. Sometimes these members would get up and go out to answer the telephone.

Q As a matter of fact, that was rather a common practice, to go in and out? A Yes, they got up and went out and came back at will.

Q And the Chairman did that once or twice, too? 196 A Once, but not often.

Q So you would not undertake to tell us who was there at any particular time, with the Congressmen going in and out this way? A If you asked me at any particular moment of the day exactly what members of the Committee were sitting at the table, I couldn't tell you except that I do recall that the Chairman stuck to the job continuously, although he may have gone out for a few minutes.

Q Aside from the Chairman, whom you say aside from a phone call or two, you think was there, you would not undertake to say who else was there continuously as that, because you know they weren't there. A They had a majority of the Committee there all the time, Mr. Rogge.

Q You want to undertake to tell us that, too, of your personal knowledge? A Yes. I am pretty sure they had at least five men present all through the day; but which five they were I would not undertake to say.

Q So that if I asked you who was there at the time Mrs. Fleischman was there, aside from mentioning the Chairman, you would undertake to say who else was there, would you? A Well, I can recall this about Mrs. Fleischman's testimony: I believe that Mr. Bonner questioned her, and I think Mr. Mundt. 197

Q Incidentally, this document which has been marked Government Exhibit—what?

THE COURT: 6, I believe.

MR. MURRAY: Six.

MR. ROGGE: Still 6?

MR. MURRAY: Yes.

BY MR. ROGGE:

Q You have read this through, I take it, in the last few days, to refresh your recollection? A I only glanced at it.

Q You did glance at it? A I have not taken time to sit down and read it through.

Q Now, who else besides Mr. Mundt, you said Mundt and Bonner? A I think Mundt and Bonner took an interest in her examination, and I am sure the Chairman was there.

Q Now, do you recall who the first witness was before the House Committee on that particular day? A No, I don't.

Q I take it the Committee was sitting in full session on that day? A It was executive session.

Q I mean, it was a meeting of the full Committee 198 and not a meeting of the subcommittee? A Yes, that is correct.

Q You don't recall who the first witness was? A No, I haven't even bothered to look it up.

Q Maybe I can refresh your recollection. A I will be glad to look at it.

Q The first witness called on April 4th was T. Auslander, is that right? A That is right.

Q Now, who was present at his questioning? A Well, I am sure the Chairman was there. I don't know that Mr. Rankin got there on time, but I think he came in shortly after the session convened.

Q In other words, Congressman Rankin was late? A Well, I am afraid he was; but I think Mr. Thomas was there, I think Mr. Bonner arrived late; I think Mr. Landis was there, and I know that Mr. Mundt arrived, but whether he arrived before the testimony of this witness was completed, I do not recall.

Q You have a personal interest in this case, do you not, Mr. Adamson? A No, sir. I have no personal interest in the case.

Q And a bias against the defendant? A No, sir. That is absolutely untrue, Mr. Rogge.

Q Don't you recall shouting at her on this particular day, on April 4, when you were questioning her?
199 A Never, never. I never shouted at a witness in my life.

Q Is it not a fact that you have a bias against anyone who is using the word "Democracy"? A No, sir, that is utterly false.

Q Well, now, didn't you write a letter to the National Committee to combat Anti-Semitism, demanding to know what they meant by using the word "Democracy" and reminding them that this country was a Republic and not a Democracy? Do you remember writing that?

MR. MURRAY: I object to that.

THE COURT: Sustain the objection.

MR. ROGGE: This is on the basis of bias and interest.

THE COURT: You are not dealing in bias and interest in this particular case, and that is all we are concerned with here, sir.

I will sustain the objection.

BY MR. ROGGE:

Q Is it not a fact, that whenever you caught anyone using the word "Democracy"—

MR. MURRAY: I object—

THE COURT: I will sustain the objection to that and warn you, we will not proceed along that line further.

MR. ROGGE: Would your Honor indulge me a moment?

THE COURT: Yes, sir.

200 [Off the record.]

MR. ROGGE: May we approach the bench?

THE COURT: Yes.

[Thereupon, counsel approached the bench and the fol-

lowing proceedings were had without the hearing of those in the jury:]

MR. ROGGE: I don't want to trespass on your Honor's ruling, but I had other questions along the same line.

For instance, that he thought opposition to Franco Spain was un-American.

THE COURT: We are not concerned with that, sir.

Are you hearing this, Mr. Murray?

[The reporter then read the statement at the bench by Mr. Rogge.]

MR. ROGGE: Another thing I wanted to go into were the circumstances, and this is again attacking his credibility, the circumstances under which he left the House Committee.

There was some dispute at that time that I remember reading about in the newspaper. I don't remember exactly what it was.

THE COURT: I would not allow that, sir.

MR. ROGGE: That is all.

THE COURT: Before you leave, Mr. Rogge:

What we are here doing is in conformity with what we tried to do throughout, we tried to eliminate, or limit the thing to the issues in the case, and not bring in a lot 201 of extraneous matters. I don't think we ought to go into that other phase because I think it destroys the effectiveness of what we are trying to do.

[Thereupon, counsel returned to the trial table and the following proceedings were had in open court:]

THE COURT: Do you have anything further?

MR. MURRAY: I have no re-direct.

THE COURT: May the witness be excused?

[No response.]

THE COURT: You are excused.

[The witness was excused.]

MR. MURRAY: I have nothing further to offer at this time, except the matter which counsel has spoken to the court about on the issue of relevancy and pertinency.

MR. ROGGE: As a matter of fact, if your Honor wishes to, I am perfectly happy to tackle the issue of pertinency, if your Honor wants to devote the time to it. We will work it out in the presence of your Honor.

THE COURT: We will excuse the jury.

Gentlemen of the jury, we will excuse you temporarily, with the same admonition as heretofore given, and with that you will retire with the Marshal, please.

[At this point, as instructed by the court, the jury retired to the jury room temporarily.]

202 MR. ROGGE: I think I might as well begin with it this way, if it is agreeable to your Honor, and we will see how it works.

Mr. Murray submitted a stipulation to me which I found agreeable, but Mr. Wolf felt that it should be specific, so I think I will let him state the preference, and see how that works out, if that is agreeable to the court.

THE COURT: Let me read it so I will know what we are talking about, please, sir.

[Thereupon, a paper writing was passed to the court.]

THE COURT: All right, Mr. Wolf.

MR. WOLF: If the court please, my recollection is that Congressman Wood, and Mr. Alexander were the witnesses who testified with regard to pertinency. In addition, there was introduced some testimony given before the Committee itself, from a Miss Mitchell, and there was testimony given by Mr. Alexander and, I think a letter and a report which Congressman Wood had, was introduced through Congressman Wood.

I think the thing we ought to do is specifically stipulate that if these witnesses were present they would testify as they did at the previous trial, the same objections would be made and the same rulings would be made, rather.

THE COURT: That is true as to the oral statements as to certain documents, if I recall, which were introduced?

MR. WOLF: Yes, sir.

203 THE COURT: If I understand you correctly, sir, and if I understand what we are trying to do, it is this:

That each side shall be entitled to everything that was put in on the question of pertinency, with the objections which were raised by either or both sides, where they were, and those objections of course to continue as objections in this case, as it did in the previous case.

MR. WOLF: I have gone through the records completely. Therefore I have some slight hesitancy—I do remember those two witnesses, and that material was introduced. Mr. Murray may be able to tell me whether anything else was introduced on the question of pertinency, as far as the Government was concerned.

MR. MURRAY: I recall nothing more than what Mr. Wolf mentioned.

THE COURT: I don't think you are limited, either of you.

If there is any official record, and I think you and everybody else agrees that that is the record—

MR. ROGGE: My own feeling, and I say this to Mr. Wolf, too, the reason I did not object to this stipulation, I have no objection to anything that goes before your Honor. The thing I am concerned with—

THE COURT: That is right.

MR. ROGGE: Is to hold down what is the record before the jury.

204 THE COURT: None of it is going before the jury today, and nobody is going to comment on this because I am going to treat it as a matter of law and do exactly as I did in the previous case. Whatever I did say, I don't recall just now.

MR. WOLF: In addition to that testimony, defendant offered testimony from a Howard Lee Brooks and William Howard Carey—

THE COURT: On that question?

MR. WOLF: Which we have—

THE COURT: On that question,—I think you are entitled to it.

MR. WOLF: The court didn't accept the testimony. We made offers of proof and would like to have the same thing apply here.

THE COURT: Let me make it as embracing as I can. This is what I had in mind, and see if this conforms to what you have in mind.

MR. ROGGE: May I also throw in the hopper: We also made certain offers of proof your Honor excluded with reference to the conduct of the House Committee. I would like to have that treated in the same way.

THE COURT: Well, we have another issue.

But don't let's confuse the one thing. I have ruled on those things separately from the pertinency.

MR. ROGGE: Right.

205 THE COURT: Let's deal with one thing first.

As I did hold in the previous case, I will hold in this case that on the basis of the record made, that it was pertinent for the Committee to inquire of these people, members of this Joint Anti-Fascist Refugee Committee. There were certain witnesses who appeared on behalf of the Government who testified verbally and I believe in the course of that proceeding certain documents were introduced in evidence. There was, of course, certain exhibits proffered or offered by the Government, and certain objections made to some of them, and it may be that you offered some in the nature of rebuttal of those.

In other words, what I am saying now, sir, is that anything relating to that particular feature of the case will be understood to be a part and parcel of the record, which the objections and exceptions noted in this, as if it were those witnesses who were testifying from the stand today.

Am I making myself clear to you gentlemen, what I intend?

MR. MURRAY: I think I understand the court and am in accord with such a stipulation.

MR. ROGGE: I would have two comments, if the court please:

Your Honor's statement is agreeable. I don't want to complicate matters, but can we look to a similar kind of stipulation in this other testimony, or offer of testimony that I mentioned again with a view of shortening the record?

THE COURT: Wait, Mr. Rogge. You are confusing the court.

206 Let me see. You said that that was agreeable, what I said to you as to the element of pertinency?

MR. ROGGE: Right.

THE COURT: Then, we will understand for the record that Mr. Wolf and Mrs. Fleischman and Mr. Rogge and the Assistant United States Attorney agree as to what has been said by the court with reference to the element of pertinency?

MR. ROGGE: And I should say—

THE COURT: Stick to that one.

MR. ROGGE: I am sticking to pertinency now, but I must add that Mr. Wolf wants me to restate the objections that we made to this stuff that was brought here from this woman, Mitchell. I objected to it, at the time, and I think your—

THE COURT: I will add—any objections which were made to testimony to which I am referring, will be understood to be in this record, too.

Does that complete it, sir?

MR. ROGGE: That is right.

THE COURT: That is stipulated, and the jury will have nothing to do with it. The court will rule, as a matter of law, as it did before, on what is pertinent to commit to the jury on this matter.

You then have the record behind you for the accuracy or inaccuracy of what I have done and it will not be necessary for any testimony to be offered on the part of

207 the Government and no mention of that testimony will be made to the jury by either side.

Is that understood, gentlemen?

MR. MURRAY: It is, and it is agreed to.

THE COURT: Do you understand?

MR. ROGGE: Yes, sir.

THE COURT: And I understand that is with the acquiescence of Mrs. Fleischman.

[The defendant nodded in the affirmative.]

THE COURT: Now, you have another question?

MR. ROGGE: Right. During the course of the trial, I have not had an opportunity to go through this record in detail. There were many offers of proof and there may have been some evidence that got in. There were many offers of proof with reference to the conduct of the House Committee. I had Mr. Peterson as one witness. I made certain offers of proof through Congressman Wood and there have been offers of additional evidence on it. Your Honor excluded the testimony but I would like to state, for the sake of the record here, that I would have to repeat the same offers unless it may be again stipulated between Government and myself that all those offers of proof with reference to the conduct of the House Committee which were made in the other proceeding may be considered to have been made here, with the same objections and the same rulings by the court on them.

208 THE COURT: Let me ask one question, in the interest of time and propriety.

MR. ROGGE: What is that, sir?

THE COURT: That is in your case?

MR. ROGGE: Right.

THE COURT: I will say at the present moment it would be inappropriate.

Now, we can deal with that when we get to your case. I think it would be more appropriate as of that time, unless Government has a different feeling.

MR. MURRAY: Whenever it is done, that it be done.

MR. ROGGE: That is agreeable to us.

THE COURT: Well, make that at some later point in the case when you are ready.

Now, where do we go from here, gentlemen?

MR. MURRAY: That will be the completion of the Government's evidence, with the exception of the further attempt we will be making to prove who were the members of the Executive Board of this organization in April of 1946.

That will require some time, I am afraid, your Honor.

THE COURT: And is that what you will have as the rest of your case?

MR. MURRAY: The rest of my case will be that only.

THE COURT: How long do you contemplate your case will be, Mr. Rogge?

209 MR. ROGGE: I have not discussed it with associate counsel, but I certainly would not estimate it at more than a half a day, Judge.

THE COURT: You are not ready to go forward at this point?

MR. MURRAY: I have to issue subpoenas to produce witnesses that I did not anticipate I would need.

MR. ROGGE: As a matter of fact, I might say that I had not expected quite this development, either, except that I know law suits, and the unexpected things always happen, Judge.

It is agreeable to me, if it will fit in with the court, I know I heard this morning that jurors were told to return on Monday, April 5th.

It is agreeable to me, if it fits in with the plans of Government counsel, and the court, to continue this case until that time and then bring their additional people here by subpoena.

THE COURT: If I do it, sir, it will be because I have to.

If we reach a situation where that is compulsory—

MR. ROGGE: I may say, backing up on this, I cannot say when I first had it, but I certainly had it, I think, shortly after the close of the other trial, that the Government would never be able to prove this case on account of the things we have been discussing at the bench, if the court please, and I have to rest on that.

Sure, I am willing to stipulate that—

210 THE COURT: I am not going to deny you any thought you had, even a long time back, sir.

MR. ROGGE: I don't want the court to get the impression that I have—

THE COURT: You needn't argue, Mr. Rogge. I am not going to get any impression.

What you want to do and counsel should do is proceed with all dispatch, protecting the rights of their clients and the Government on the one hand and the defendant on the other.

I have a right to expect that and nothing more.

MR. ROGGE: I want the court to understand that my position with the court is more important to me than any other single thing, and I said I had the idea the Government could not prove its case.

THE COURT: You will have a chance to argue that at the proper time.

MR. ROGGE: And, I don't want to just—

THE COURT: I don't know if you are in position to state when?

MR. MURRAY: We are trying to get them here to-morrow morning.

THE COURT: Do we have anything further we could do at this time on your behalf?

211 MR. ROGGE: The only other thing is the stipulation I suggested and which Mr. Murray, I understand, will go into. I am sure we will have no difficulty with that. That will shorten my proof considerably and it might even be that my case will be less than an hour, if the court please.

THE COURT: If we recess now, you say you can use that to advantage, is that right?

MR. ROGGE: I don't have a witness here.

THE COURT: I am talking about your stipulation.

MR. ROGGE: Well, the stipulation, I think we are agreed on already.

MR. MURRAY: So far as I am concerned, your Honor.

MR. ROGGE: So that what remains, as I see it in this case is, any further witness Mr. Murray may seek to bring here, and argue a motion for an acquittal.

THE COURT: You state you will go forward with your case?

How long will you anticipate?

MR. ROGGE: On the basis of the stipulation, I would say less than an hour.

THE COURT: All right.

Then, gentlemen, there being nothing further we can do at this time, we will recess until tomorrow morning at ten o'clock.

We had better bring the jury back and tell them.

[At 3:05 o'clock p. m., the jury returned to the courtroom where the following proceedings were had in open court:]

THE COURT: You gentlemen need not take your seats, but stand in front of the box, please.

212 Gentlemen, the court is going to recess at this time, to return tomorrow morning at ten o'clock, admonishing you as it has heretofore, to speak to no one with reference to this case, permit no one to talk to you about this case, nor are you at this time to talk among yourselves with reference to this case.

Similarly, you are not to read anything about it in the newspaper, if perchance it should be in there, or any articles or comments that may be on the radio, and with that further admonition, you are excused.

Is there any further admonition desired by counsel for the Government or defense?

MR. ROGGE: Nothing.

MR. MURRAY: Nothing.

THE COURT: There being nothing further, gentlemen, you are excused to return tomorrow morning at ten o'clock.

[Thereupon, at 3:10 o'clock p. m., the court stood in recess until the following morning, with recess until Thursday, March 25, 1948 at 10:00 a. m.]

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Proceedings

THE COURT: Ready to proceed, gentlemen?

MR. MURRAY: Yes, your Honor.

Call Dr. Barsky, please.

May the Clerk announce the rules as to witnesses in case there are witnesses in the court room?

THE CLERK: Any witnesses present in the case of Ernestina G. Fleischman?

THE MARSHAL: Dr. Barsky is out here, your Honor. Thereupon,

Edward K. Barsky

called as a witness by the Government, having been first duly sworn, took the stand, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q Your full name, sir, is Edward K. Barsky? A Yes, Dr. Edward K. Barsky.

Q And you are a practicing physician in New York City? A Yes, sir.

Q Dr. Barsky, did you appear before the Committee on Un-American Activities of the House of Representatives, in Washington, D. C. on April 4, 1946? A Well, I would like to claim the privilege against self-incrimination and I don't think I care to answer that question.

215 THE COURT: Suppose you gentlemen come to the bench.

(Thereupon, counsel approached the bench and the following proceedings were had without the hearing of those in the jury:)

THE COURT: I didn't ask him, sir, what is his privilege.

MR. ROGGE: I have a case that is precisely in point, Judge.

THE COURT: All right, sir.

MR. ROGGE: The People against Den Uyl.

THE COURT: I didn't hear you.

MR. ROGGE: D-e-n U-y-l, 318 Michigan 645, decided in October.

THE COURT: 645?

MR. ROGGE: Right. I will let your Honor look at the case.

THE COURT: Are you familiar with this case, Mr. Murray?

MR. MURRAY: No, your Honor.

MR. ROGGE: I have some other comments I want to make on it generally.

It is one of the few times when I can come into court with a horse-collar case, but that is it.

THE COURT: What makes that case applicable here, Mr. Rogge?

MR. ROGGE: On the facts in that case, as I gathered them, they were as follows:

A man was indicted in a Federal Court and he was convicted. His conviction was sustained by the Circuit Court of Appeals. He had a petition for certiorari, and under those circumstances he called and asked questions, and we claimed his privilege and the prosecuting attorney said, "The danger of self-incrimination therein by answers to questions propounded in this case would be remote, fanciful, speculative, and not reasonably to be expected to arise out of the ordinary course of the law."

To that the Judge said, "I do not believe that the verdict of guilty concludes that case in the Federal Courts, nor does it render the danger of self-incrimination remote or fanciful or speculative, as alleged in this motion; and that does not become true, in my judgment, until such time as the time for appeal passes and the person convicted commences to serve) the sentence imposed upon him without further right of appeal except by a special leave of the court, because, in my judgment, * * * if the case should for any reason be reversed and sent back for a new trial, the danger of self-incrimination again arises."

And to that the Supreme Court of Michigan, in a unanimous decision, said this:

"As intimated above, the Circuit Judge was not in error in refusing, after Hemans had been convicted, to set aside the order theretofore made sustaining Hemans' refusal to answer the questions involved in this appeal. At the time of the lower ruling the case against Hemans had not been prosecuted to a final conclusion. It is still pending in the Federal Courts. In event of Hemans being granted 217 a new trial the testimony which Hemans refused to give, had he answered, might still be used against him in violation of his Constitutional right."

Here, the case is on appeal. It is true there was a 2-to-1 decision, but there was a strong dissenting opinion.

We have filed a petition for a rehearing. If that is denied, we are going to petition for certiorari. It is a case on all fours with this Michigan case and it falls in line with the general rule, as stated in the Wigmore, and in other cases, that unless all possibility of further penalty has been removed, the court will sustain the claim of privilege, and furthermore, the cases are also to the effect that the Judge isn't going to judge for himself the effect of the witnesses' answers. He is not going to put his head on the witness's shoulder and decide that. The witness has a lot to say about it.

As the Court of Appeals for the State of New York said in a very recent case—this in re Grae—282 New York 428:

“But our courts have recognized the difficulty in most cases of anticipating the effect upon a witness of his answer to a given line of inquiry and so it has been ruled that, in the absence of conduct by a witness which is clearly contumacious, the witness must be permitted to judge for himself as to the effect of his answer.”

Now, I don't know what Dr. Barsky's reason is. Your Honor can question him further, if you wish. I defer to Your Honor.

218 THE COURT: You have doubtless talked to him. What is the reason?

MR. ROGGE: His reason is: Suppose there is a new trial—this evidence can be used against him, evidence that he gives here can be used against him in that new trial, and his first question was, “What is this? I thought my case was on appeal.”

I told him, “This is with reference to your being a witness for the Government in Fleischman's case.”

THE COURT: In re Grae, 282 New York 458.

MR. MURRAY: I remember in the—

MR. ROGGE: The court says, as generally stated in Wigmore, third edition, section 2279—

THE COURT: Section—

MR. ROGGE: 2279, which shows that the privilege ceases only when there is a conviction that completely discharges all liability to the State and removes the possibility of further penalty.

That is another thing. I haven't completely studied out whether there might be other statutes that the State would claim these people violated. It is really enough to know that his case is pending in the Court of Appeals, and in event of a reversal this evidence could be used against him. He was asked to go down there on April 4th in this transaction involved.

THE COURT: In this case you referred to, the Michigan case, wasn't there a request for dual jurisdiction, the possibility of a State trial as well as a Federal trial? I haven't read it fully, as you know.

219 MR. ROGGE: One other point that was mentioned: He was called up twice. He was called up before the proceedings in the Federal Court, and when he was called up that time—

THE COURT: In Michigan?

MR. ROGGE: In Michigan. He was called twice in Michigan, once before their Grand Jury. The first time he hadn't been tried, and there—I think this makes it clear. The point was, an immunity granted by a State court would not afford protection to Hemans in the Federal case.

THE COURT: I missed what you said. I am sorry.

MR. ROGGE: His point was: He wouldn't get immunity in the Federal court although, even if he could get immunity in the State courts. That was his point the first time he was up.

Now, the second time he was up was after he had been convicted and his appeal had been affirmed in the Circuit Court of Appeals, and there the State made the point,— "Well, there is no possibility of any further penalty."

Now, the same here. I mean, I think the fact that the prosecution is in the State court makes no difference from this point of view. The man claims his privilege on the ground that there may be some further penalty involved, and there may be if there is a new trial.

220 [Thereupon followed remarks by Mr. Wolf and Mr. Goldman which were not heard by the reporter.]

THE COURT: In this situation, as it now stands, this man was convicted in the District Court. In the Court of Appeals that conviction was affirmed. It is true, as you suggest, there was a dissent. The dissent in that case referred to freedom of speech, a Constitutional question. That particular question raised by the dissenting Justice

in the Court of Appeals for the District of Columbia was a subject of specific inquiry by the Supreme Court in the Josephson case.

Does that have any effect on the instant case, sir?

MR. ROGGE: Yes. Your Honor can point out to me that the Supreme Court denied certiorari in the Josephson case. That involved one of the points involved, the First Amendment. It doesn't involve the points under the Fifth and Sixth Amendments, whether there was a reasonable, ascertainable standard of guilt.

In other words, there are additional points in our case on the basis of which I submit the Supreme Court will grant certiorari. In any event, we are going to apply for it, and in this particular case there was, apparently, a unanimous decision in the Court of Appeals. If there was a dissenting opinion, it wasn't mentioned.

THE COURT: You found nothing in the Federal Courts?

MR. ROGGE: I have found only a general statement in the Federal Courts. I found, for instance, a 221 general statement in a case I tried, the case of Schuman against the United States, 117 Fed. 2nd 110 at 117, I mean, it is just a general statement. It is not specific. It says the witness called to testify may not refuse to be sworn and tell what he knows up to the point of his involvement in the crime; but at that point he may claim his constitutional privilege and refuse to go further unless given full immunity. That is only a general statement.

We have some others, but again they are only general statements.

[There followed a discussion which was off the record.]

MR. ROGGE: I think he may claim the privilege and it should be sustained. I thought that was the case and I mentioned it yesterday. I didn't have the case at that time.

THE COURT: Have you gentlemen anything on the point?

MR. MURRAY: I think I should state my views frankly to the court. I think it is legally possible for this witness to obtain a new trial in the present status of the case. We can't say that it is not a legal possibility that he will get a reversal under conditions which would call for a new trial, at which time it would be possible to use against him anything he said today.

That Michigan case, in my opinion, is not correct insofar as it refers to the extent of immunity. As I understand it,

it extends only to the sovereignty where it is invoked, but that is beside our present discussion; and as to the right of the witness to be a final judge, I don't agree with that. I think the court has the discretion, and the duty to exercise it, as to what questions might tend to incriminate him, giving, of course, a very broad view in favor of the witness on that question.

Now, the present question is: "Did he come down to Washington on April 4 and appear before the Committee on Un-American Activities?"

Well, the proof that he did so, of course, is overwhelming; but it is possible that his admission, even though it would be a cumulative bit of evidence, would tend to incriminate him.

I do believe there are other questions I propose to ask, which might not fall into that category, and I think we can fairly argue to the court when they are put, that they wouldn't have that tendency.

If the court wishes, I will indicate at this time what they are going to be.

THE COURT: I am interested in the principle first.

MR. MURRAY: It seems to me, where a person has a matter pending in court, which carries the legal possibility of a new trial against him, in the transaction about which he is being questioned, that he can claim immunity.

THE COURT: I haven't looked it up, gentlemen, but

I am impressed by the fact that while it is remote

223 or may be remote because of what has transpired, that there isn't sufficient finality that it would lift this case from it.

Is it worth our while? Have you gentlemen exhausted your search? Is that all of it?

MR. ROGGE: I had Mr. Goldman looking rather late last night.

MR. GOLDMAN: I think the Michigan case will be found to be the only authority, I would say, squarely in point. As I say, I worked on it late last night, and searched as exhaustively as I could. I found no other case, going completely through the Federal Digest, raising the point, and you will note the Michigan Judge cites no specific authority.

THE COURT: He doesn't?

MR. GOLDMAN: It is the first time the specific question has arisen and it would be rather unusual that the specific question would arise in two cases immediately following each other.

MR. MURRAY: A practical analogy occurs to me. We prosecutors have never thought we had the right to ask a witness who had been convicted, and whose case was on appeal, about that conviction.

THE COURT: That is right. That is correct.

MR. MURRAY: The reason was that it wasn't a final conviction as of that time.

THE COURT: You are absolutely right in that statement.

224 Are you satisfied that Mr. Goldman and these other gentlemen have exhausted this question?

I will say frankly as of this time I am inclined to agree with them unless there be something shown to the contrary.

MR. MURRAY: I agree to the general principle.

THE COURT: I think, in the interest of justice, I may give you an opportunity. I don't want to take it unnecessarily.

MR. MURRAY: I agree with the general principle, and this Michigan decision is in line with it. I am not disposed to dispute their representation.

THE COURT: Then the only thing you have left is as to what comes out of that privilege.

MR. MURRAY: That is immunity, yes.

MR. WOLF: If the court pleases, I think that considering that, I think Mr. Rogge said with regard to this particular point there was a great deal of evidence in the record already. One of the questions on appeal is the propriety of introduction of a great deal of that evidence, and that is a point which Judge Edgerton indicated no position on at all. That would be, if certiorari were granted, it may be that all the overwhelming evidence Mr. Murray refers to will be out of the case and this may be crucial.

THE COURT: You don't need to argue that point there. The only question that I am asking now is: 225 What is it that you might offer which would be without the basic principle?

Let me ask you this. We are standing here and everybody is uncomfortable.

Are you in a position now to state what your situation is, in view of this?

MR. MURRAY: Yes. I will tell your Honor the situation.

THE COURT: All right.

MR. MURRAY: We issued, as soon as we could yesterday, subpoenas, first by telegram and then through the mails, on this organization by name; on Miss Helen Bryan, and on all the defendants in this case except Mrs. Fleischman—16 persons and Miss Bryan, 17 persons and the organization.

The only witness who, to our knowledge, has appeared here, so far is Dr. Barsky.

The only witness we can expect to appear within the next hour or two would be witnesses who were served last night. We don't know whether any were served last night in addi-

tion to Dr. Barsky. The Marshal who has charge of those services in New York City was, at 10:30, still out attempting to make service of them and we were not able to get a report as of that time, of what success, if any, he had had.

Under those circumstances, if Dr. Barsky's presence is finished within a short time, we will be in a position of not having a witness immediately available,—in a position of having potentially a few persons who may appear before the court day is over. It is rather uncertain.

226 THE COURT: Mr. Rogge said yesterday he was agreeable to going over to the fifth, and I didn't want to do it, but if we have to do it, as I said yesterday, possibly we will have to do it.

I was in hopes, as I said to you yesterday, Mr. Rogge, that we might do this in anticipation, but it is clear to me we are not going to finish, no matter what happens today.

So I wonder if this means anything:

We have had a very fundamental issue raised here, Mr. Murray, a contingency under which we are operating as to the witness, I am anticipating, maybe unjustly or incorrectly, that these other persons will assert their constitutional privilege, too, and I am not so sure if, even if they don't assert their constitutional privilege, but what I might say something to them. I think it might be my duty at this point in the light of what transpired, to Mr. Barsky, for me to call attention at least that they have the right to assert their privilege, and I think that would be my duty.

MR. MURRAY: We would not suggest anything different.

THE COURT: I am not, for one moment, suggesting you would. I think you have always been fair. I think it is the court's duty, I think it would be my duty. You surely wouldn't permit Mr. Barsky to do this,—and other people similarly situated,—to put themselves in that position.

I would not, and I know you would not want it.

227 MR. MURRAY: In that connection, I have a comment to make.

THE COURT: Yes!

MR. MURRAY: Five of the persons we have subpoenaed have had their prosecution finally terminated against them, even to the point of finishing their probation period, if there was any.

MR. ROGGE: I don't know what their attitude will be. I don't know, Judge.

THE COURT: I am not asking you to say.

What I am saying, Mr. Rogge, coming back to what you said, you are agreeable to going over to the fifth?

MR. MURRAY: May I suggest that we exhaust our efforts with this particular witness, and if we fail with him, that is the end of him. We wouldn't have to come back on the fifth.

MR. ROGGE: I may say, I can't object to that, of course, but I can't conceive of anything to which we couldn't claim privilege. I am perfectly happy to have Mr. Murray ask him questions. I can't conceive of anything he could ask him to which I would ask him to—

THE COURT: Would you like me to exclude the jury and ask Mr. Barsky to come in and put the questions to him and have the picture clear?

MR. ROGGE: As a matter of fact, we appreciate that suggestion.

228 THE COURT: I think this, gentlemen. While you are up here, so we won't delay, if we get to the point where we find Dr. Barsky has anything that is proper for this case, in the interest of moving along we would probably do well to continue this thing until after the holidays, because during that period many of these difficulties which have now arisen can be ironed out and we are just wasting time now.

MR. ROGGE: That is agreeable.

MR. GOLDMAN: That is agreeable.

THE COURT: Just a minute.

We will now excuse the jury temporarily.

[Thereupon, counsel returned to the trial table and the following proceedings were had in open court:]

THE COURT: Gentlemen of the jury, and alternate juror, the Court will temporarily excuse you now, and take up a matter which you are not concerned with at this time, and you will accompany the Marshal at this time.

[Thereupon, the jury left the court room in company of the Marshal, as directed by the Court.]

THE COURT: Dr. Barsky, you may resume the stand, please.

Thereupon,

Edward K. Barsky

the witness previously on the stand, resumed the stand and testified further as follows:

Direct Examination

229 THE COURT: So there will be no question about this, Mr. Rogge, I will ask Mr. Murray to ask the question, and Doctor, you do not answer the question until counsel has had an opportunity to speak and the Court speak too. In other words, he will put the questions to you, and you will wait. That is the best procedure to be followed.

MR. ROGGE: That is agreeable. I can say now that if that is followed, I don't know, of course, what Mr.—

THE COURT: I don't either, sir.

Do you know any other protection?

MR. ROGGE: I think that is agreeable.

THE COURT: And adequate?

MR. ROGGE: Yes.

THE COURT: Doctor, what we are doing now is in your interest. We don't want you to say anything until there has been a determination. In other words, Mr. Mur-

ray will put the questions and you remain silent until we have had an opportunity.

THE WITNESS: I understand.

BY MR. MURRAY:

Q Dr. Barsky, on April 4, 1946, was Dr. Jacob Auslander, to your knowledge, a member of the Executive Board of the Joint Anti-Fascist Refugee Committee?

THE COURT: Was he a member, sir?

Did you say "Was he a member?"

MR. ROGGE: Object.

230 THE COURT: I will sustain the objection as to that.

MR. MURRAY: I will say for the record that I would ask that same question as to each of the other members except the witness.

THE COURT: I will sustain the objection to those.

BY MR. MURRAY:

Q Dr. Barsky, I show you a paper which has on it, Government 36-C, which is now one of the records of the United States Court of Appeals for the District of Columbia, so identified on yesterday by Mr. Seerest, Assistant Clerk of that Court, and ask you to look at it.

THE COURT: You need make no comment. Look at it and hand it to me.

MR. MURRAY: Now, I will put the question part of my question.

THE COURT: Will you wait just a moment.

I will sustain the objection to that, sir.

MR. MURRAY: May I put the question?

THE COURT: You may.

BY MR. MURRAY:

Q The question is this—you understand that you are not to answer, Doctor?

Is that paper a record from the files of the Joint Anti-Fascist Refugee Committee?

THE COURT: I will sustain the objection to that.

231 MR. MURRAY: Pardon me a moment.

THE COURT: Is that all, gentlemen?

MR. MURRAY: Pardon me a moment. I want to see if there is anything else we could ask, your Honor.

We have no other questions, if the court please.

THE COURT: All right, Doctor, you may step down.

[The witness was excused.]

MR. ROGGE: This thought occurs to me, Judge.

If the only additional thing that Mr. Murray is seeking to prove, and I don't know, before he rests, who the members of the Executive Board were on April 4th, I might be willing to stipulate that, but I would want to confer with my associates first. I still don't think the Government would make out a case, and we would move along to argue a motion for an acquittal and finish it here today. I would like to consult for five minutes with my associates on that, if that is all Mr. Murray seeks to prove.

MR. MURRAY: That is all I sought to prove yesterday, and it was only because Mr. Rogge would not admit that paper in evidence that I was put to the desperate extreme of inconveniencing 17 people, but I am not interested in any further stipulations in so far as I am concerned.

THE COURT: Then we come to the point which we discussed at the bench, as to the continuance of this case until after the Easter recess.

I think, gentlemen, that in view of the fact that
232 where we are—

Go ahead. Have you gentlemen finished?

MR. MURRAY: Will you allow us to confer for a moment?

THE COURT: Yes.

MR. MURRAY: If the Court please, Mr. Molenof has discussed the matter of my rather sudden rejection of the offer of stipulation, and in discussing it—

THE COURT: We haven't even gotten the stipulation, Mr. Murray.

MR. MURRAY: I said that I was not interested.

THE COURT: I think we have probably reached the point where we are not going to be able to finish it.

We are not going to finish today, are we?

MR. ROGGE: I am expressing a personal opinion on it. If that concludes the Government's case, then I am going to argue that your Honor has to grant our motion for an acquittal and that does end the case today.

May I say, when it was up before, I was confused about the aiding and abetting. I think I have it straightened out and I think your Honor must clearly direct an acquittal under those circumstances. We will finish today.

On the other hand, if it follows the other route and your Honor followed that route, my opening statement and proof and everything, I don't think, will take over a half

hour, and then there will be a summation to the jury
233 and the jury charge. We have some charges, there

are a lot of details involved, but following the direction of an acquittal route, then we can finish today and that, I think, is what is going to happen to this case. In the interest of arriving at that result, I make my offer of a stipulation as to the 18 persons listed on 36-C, being the members of the Executive Board on April 4th, 1946. That I am willing to stipulate.

MR. MURRAY: That what? Providing the court direct an acquittal, you mean?

MR. ROGGE: No, no. I haven't depended on that at all. A direction of acquittal consists, if I convince his Honor of what I think is the right position, of course, there wouldn't be anything like that tied to that stipulation. The stipulation is there.

MR. MURRAY: I think we had better go on in the regular way.

THE COURT: I think we will probably save time, gentlemen.

You stated yesterday, the fifth is agreeable as the first day we will be back. Suppose we bring the jury in. I

would like to have the advice of you gentlemen as to any statement by way of admonition that you desire to make to the jury other than what I have heretofore, sir.

MR. ROGGE: I think your Honor covered that to our satisfaction every time, Judge.

234 THE COURT: April 5th.

MR. MURRAY: That is Monday.

THE COURT: Monday, April 5th.

[Thereupon, after having been excused temporarily, the jury returned to the court room and the following proceedings were had:]

THE COURT: It is not necessary for you gentlemen to take a seat. Just stand in front of the box, please.

Gentlemen of the jury, and alternate juror, the Court at this point is going to recess this case until Monday, April 5th, at 10:00 a. m., in this court room. It does so with this admonition:

You are not to talk to anyone about this case, nor are you to permit anyone to talk to you about this case nor are you at this point or between now and then to talk amongst yourselves with reference to this case; likewise, you are to ignore, if any article appears in the newspaper or any periodical with reference to this case, or if by any chance anything be said on the radio you will ignore that and cut that off.

With that admonition, unless there is further admonition from respective counsel, you are now excused, to return to this court Monday, April 5th at 10:00 o'clock.

Nothing further, gentlemen?

MR. ROGGE: That is agreeable.

MR. MURRAY: That is agreeable.

235 [Thereupon, at 11:30 a. m., a recess was taken until Monday, April 5th, at 10:00 a. m.]

THE COURT: You may proceed.

(Thereupon, the jury having been excluded from the courtroom, the following occurred:)

MR. ROGGE: May it please the Court, I have two matters I wish to take up, the second of which is a motion to quash a subpoena, but before I do that I would like to mention first that one of the witnesses under subpoena here this morning—incidentally, the Government came out with such an unprecedented bunch of subpoenas as I have ever seen—and one of those subpoenas is Howard Fast, who wishes me to advise the Court that he has a wife in labor in a hospital now, and he would like to get away as soon as possible to go back to her bedside. I mention that with the idea that perhaps if counsel can convenience him—

THE COURT: I am sure he will.

MR. MURRAY: I will call him immediately, but I anticipate he will make claim as to his immunity.

MR. ROGGE: I expect he will do that, and while the jury is out I think I would like to call Your Honor's attention to the fact that in my opinion one of these subpoenas is so broad that it must be quashed. When I got back to my office—

THE COURT: I have nothing before me.

MR. ROGGE: I will give you my copy. I wonder 242 if the Government has a copy.

MR. MURRAY: Do you mean that one with three parts addressed to the organization?

MR. ROGGE: That is the second one addressed to the organization.

MR. MURRAY: Yes, I have that.

MR. ROGGE: There were two addressed to the organization.

THE COURT: All right, sir.

MR. ROGGE: Now, Judge, when I looked at this subpoena I didn't know whether this was from the Government or from the House Committee on Un-American Activities.

It was so broad I went back to the indictment because I was sure that Mr. Murray and I must have different cases in mind. Here it says before the date, and this is the only thing on trial, before that date of April 4, 1946, after the meeting of the House Committee, and each of them were summoned to produce before the Congressional Committee on April 4, 1946, records, papers and documents on the matter now on inquiry, that is to say, all books, papers and so forth relative to receipts on account of the Joint Anti-Fascist Refugee Committee, and there you have it.

The indictment here charges that the crime is because these defendants failed to produce certain books and records on April 4, 1946. Now, in the light of that let's look at what this subpoena calls for. It calls for all records of whatever kind, and so forth, showing resolutions, 243 decisions, consideration and action of the Joint Anti-Fascist Refugee Committee, and its agents, officers and board members not only to produce records of this organization before the Committee on Un-American Activities, but make its records available for inspection by the Congressional Committee or its agent during any part of the period from April 1, 1940, to April 15, 1946. That is not this case. This case brings us down to April 4.

Now, Your Honor will recall that there was a subpoena issued in December but there was never any proceeding on that subpoena. There was never even a time set forth. That never got out of Congress. That never got started, sir.

Now, there was another subpoena issued in January, and there were further subpoenas issued between March 23, and April 3 for an appearance on April 4.

Now, the thing we have in this case is April 4, and I do not think at this particular point Mr. Murray is going to contend, I know that the Government is not bound if it said April 6 and it was April 4, that wouldn't bind them, but I do not think Mr. Murray is going to contend for anything but the date of April 4 when this alleged crime took place, but look what he asks for. But let's go on; let's look at 3,

record sheets, receipts, contributors and contributions, as well as records showing the names of contributors, names of members of organizations who made contributions for the year 1945. What, may I ask, has that to do 244 with this case? That is what the House Committee was asking for. They say, standing under their rights under the Constitution, having been resisting for two years, that he would not be able to do indirectly what the House Committee could not do directly. Over and above that, what business has the list of contributors to do with this alleged crime which took place on April 4, 1946? As a matter of fact, I couldn't believe my eyes when I read this subpoena, so I make a motion, I think the Government has gone hog wild in getting out such a flock of subpoenas as we have seen at the tail end of a case but, aside from that, my contention is that this subpoena is too broad to call for documents which haven't the remotest connection by any stretch of the imagination to the trial now before Your Honor.

THE COURT: Mr. Murray?

MR. MURRAY: If the Court please, bringing us up to date, I want to say at the time these subpoenas were issued I reminded Mr. Rogge it was because of his failure to concede an obvious fact, which he knew to be a fact, that I was put to the extremity of issuing these subpoenas, and I told him, while before the Court that "If you compel me to do so, I will inconvenience 16 people," I think it was, and it might have become more by now, but had it inconvenienced 160 people I would, nevertheless, have issued 160 subpoenas, but that is how it started. Now we 245 are in it he finds it inconvenient, which he and I knew it would be before we started. Now, they attempt to argue it begins with this first part of this indictment, but the introduction sets forth that during a period of time which later appears to be from October 1, 1945, to April 4, 1946, the committee was conducting an investigation of this organization throughout that period

and was attempting to obtain access to the records of that organization, and issued, among others, subpoenas for April 4.

Now, of course, the relevancy of the records is not to be changed by the date in the indictment. On the other hand, we have here the right, it seems to me, to show that those defendants, this defendant, with others, had it within her power to comply with the terms of this subpoena but elected not to do so but, in conjunction and concert with others brought about a frustration of the committee by keeping from the scrutiny of that Congressional Committee records which this Court has already ruled it had a right to examine, and to do that not only on April 4 but in a period beginning around October 1, 1945, as the indictment says that the papers called for in this case, in the items of this subpoena, relate not to anything except this particular case. They call, this subpoena calls for the records, books and minutes showing meetings of the Joint Anti-Fascist Refugee Committee to produce those records before the committee, described within the time from October, 1945, to April, 1946.

246 The second memorandum calls for books and documents relating to those particular meetings.

The third asks for records of contributors and contributions, and the purpose of that is to show that there were, in fact, records which the House Committee subpoenaed to be produced. I will say in passing I am not interested in the content of it, but I would like to see if there were such records as I believe there were, and see what they look like in bulk.

The fourth item, of course, is what we have been put to this difficulty of proving due to the fact that Mr. Rogge did not concede what I say to be an obvious fact that records of this organization identified by its executive secretary at the previous trial are, in fact, what she identified them to be.

Now, we have the burden not merely of showing that this witness appeared on April 4 and did not produce the records

to the committee, but the additional burden of showing that she, along with others, could have produced them. It seems to me we have the right to prove her complicity in this concerted action to show her knowledge of what happened preceding April 4. If we can show nothing more what happened on April 4 the inference will be left that this particular defendant, no matter what the others knew on April 4th, knew nothing because she came down 247 here on April 4th and did not produce records and left. But if we can show that this organization had been asked for months by the Congressional Committee to let them see the records, that the Congressional Committee even offered to send its committee to New York to make this investigation, the results of which might never be divulged, and that the organization persisted unanimously to resist its efforts from the beginning, and that this defendant knew what was going on and assisted in resisting it, then we can get close to proving what it shows, but if we are going to be limited to what Mr. Rogge says, we can't.

THE COURT: I do not think there should be any such limitation, but I am interested in number 3. The Court held, as a matter of law, that the committee had the right to investigate and inquire into this, and doesn't that render that item 3 unnecessary?

MR. MURRAY: It may be unnecessary as I said in my comment about it, Your Honor, and I am not interested in the content but in the volume, and the fact that there were such records.

THE COURT: I don't think there was any denial that there were such records.

MR. ROGGE: That is right, there was no denial that there were such records.

THE COURT: But I do think, Mr. Rogge, I agree with Mr. Murray, that they have the right to get the other 248 three items.

MR. ROGGE: Then Your Honor is ruling out num-

ber⁹3, and as to the others I will meet them as this situation develops.

THE COURT: That is right, I am ruling out number 3; as to the others, later it may become pertinent, but at the present time I do not see any pertinency in accordance with the ruling the Court heretofore made.

Do you understand that?

MR. MURRAY: Yes.

THE COURT: Now, to convenience Mr. Fast, are we in position now where we can accommodate him?

MR. ROGGE: Yes.

THE COURT: Do you want the jury?

MR. ROGGE: I think the jury might be excluded as far as Mr. Fast is concerned.

THE COURT: All right, Mr. Fast.

MR. MURRAY: May we have the rule on the other witnesses?

(Thereupon the witnesses were excluded from the courtroom to await the call of counsel.)

Thereupon—

Howard Fast

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

249 Q Mr. Fast, I am going to ask your name and address and then put a question to you which the Court has indicated you are not to answer unless so directed.

THE COURT: In other words, he will put preliminary questions to you, and then put other questions and you will say nothing. This is in your interest.

BY MR. MURRAY:

Q Your name is Howard Fast? You may answer that.

A Yes.

Q And your address? A 43 West 94th.

Q New York City? A New York City.

Q I shall now ask you the question.

THE COURT: This you will not answer unless advised to do so.

THE WITNESS: Yes.

BY MR. MURRAY:

Q Mr. Fast, on April 4, 1946, was Jacob Auslander to your knowledge a member of the executive board of the Joint Anti-Fascist Refugee Committee?

THE COURT: Do you object?

MR. ROGGE: I claim privilege.

THE COURT: I will sustain the objection.

MR. MURRAY: I understand the witness is
250 claiming privilege?

THE COURT: So do I.

BY THE COURT:

Q Do you stand on your constitutional rights? A Yes.

MR. ROGGE: I might say that the eleven whose actions are on appeal will all take the same position.

THE COURT: I think the District Attorney has the right, sir, if he desires to call them individually.

MR. ROGGE: All right.

MR. MURRAY: I do so desire right now.

THE COURT: Now, Mr. Fast having elected to exercise his constitutional privilege on the ground that it might tend to incriminate him, do you wish to ask him any further questions?

MR. MURRAY: No, I do not.

THE COURT: Mr. Rogge?

MR. ROGGE: No, I do not.

THE COURT: Then you are excused, Mr. Fast.

MR. MURRAY: Would you report to the District Attorney's office?

(Witness excused.)

MR. MURRAY: Dr. Auslander,

Thereupon—

was called as a witness by the United States, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q Doctor, your full name? A I beg pardon?

Q Your full name? A Jacob Auslander, A-u-s-l-a-n-d-e-r.

Q What is the street address? A 120 Riverside Drive, New York City.

Q I am going to ask you a question and the Court has indicated that if you wish to claim your privilege from answering it you may do so.

On April 4, 1946, was Dr. Edward K. Barsky, to your knowledge a member and the chairman of the executive board of the Joint Anti-Fascist Refugee Committee?

That is the end of the question. A I believe the answer to this question would tend to incriminate me and I would rather not answer it.

BY THE COURT:

Q In other words, you desire to stand on your constitutional rights? A Yes.

Q And for that reason you do not desire to 252 answer the question? A That's right.

THE COURT: Very well. I will sustain it. Is that all?

MR. MURRAY: That is all.

MR. ROGGE: No questions.

THE COURT: May this witness be excused?

MR. ROGGE: That is agreeable.

MR. MURRAY: I will ask you to report to the District Attorney's office upstairs.

(Witness excused.)

MR. MURRAY: Lyman R. Bradley.
Thereupon—

Lyman R. Bradley

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q Mr. Bradley, your full name is Lyman R. Bradley?

A That's right.

Q And what is your street address? A 10 Downing Street, New York.

Q Professor Bradley, I am going to put a question to you which the Court has indicated if you desire to refrain from answering you may state that fact, and this 253 is the question:

On April 4, 1946, was Edward K. Barsky a member and the chairman of the executive board of the Joint Anti-Fascist Refugee Committee?

That is the end of the question. A I do not wish to testify.

BY THE COURT:

Q You desire to stand on your constitutional rights, sir, and not testify? A I do.

Q On the theory that it might tend to incriminate you? A I do.

THE COURT: Very well, sir, I will sustain the objection.

(Witness excused.)

MR. MURRAY: Mr. Justiz.
Thereupon—

Harry M. Justiz

was called as a witness by the United States, and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q Mr. Justiz, your full name is Harry M. Justiz,
 254 spelled J-u-s-t-i-z? A Yes.

Q What is your street residence? A 2003 36th
 and Astoria, Long Island.

Q Mr. Justiz, I am going to ask you a question as to
 which you may claim immunity from answering if you
 so desire.

On April 4, 1946, was Dr. Edward K. Barsky a member
 and chairman of the executive board of the Joint Anti-
 Fascist Refugee Committee? A I claim such immunity.

BY THE COURT:

Q In other words, you assert your immunity under the
 Constitution and do not desire to answer the question? A
 That's right.

THE COURT: Very well, sir. Anything further?

MR. MURRAY: No questions.

THE COURT: All right.

(Witness excused.)

MR. MURRAY: Miss Leider. She is here.

Thereupon—

Ruth Leider

was called as a witness by the United States, and, being
 first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

255 Q Are you Miss Leider? A Mrs. Leider.

Q Spelled L-e-i-d-e-r? A Yes.

Q What is your address? A Home address?

Q Yes. A 60 Sidney Place, Brooklyn 2.

Q I am going to put a question to you as to which you
 may claim immunity from answering if you so desire on
 the ground that it might tend to incriminate you.

On April 4, 1946, was Dr. Edward K. Barsky a member of and chairman of the executive board of the Joint Anti-Fascist Refugee Committee? A I desire to claim my immunity on that question.

THE COURT: Very well, any questions?

MR. ROGGE: No.

THE COURT: You may step down.

(Witness excused.)

MR. MURRAY: James Lustig.

Thereupon—

James Lustig

was called as a witness by the United States, and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

256 Q Mr. Lustig, your full name is James Lustig?

A That is correct.

Q That is spelled L-u-s-t-i-g? A That's right.

Q Will you state your residence address, please? A 4107 47th Avenue, Long Island City, New York.

Q Mr. Lustig, I am going to ask a question as to which you may claim immunity from answering if you so desire.

On the 4th day of April, 1946, was Dr. Edward K. Barsky the chairman of and a member of the executive board of the Joint Anti-Fascist Refugee Committee?

That is the end of the question.

A I claim immunity.

BY THE COURT:

Q In other words, you assert your constitutional right not to testify on the ground that it might tend to incriminate you? A Yes.

THE COURT: Any questions?

MR. ROGGE: No.

THE COURT: Very well. Step down.

(Witness excused.)

MR. MURRAY: Mr. Magana.

Thereupon—

257

Manuel Magana

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q. Mr. Magana, what is your first name, sir, Manuel?
A. Manuel Magana.

Q. And what is your address? A. 1363 Fifth Avenue, New York.

Q. I am going to put a question to you which you may claim immunity from answering if you desire on the ground that it might tend to incriminate you.

On the 4th day of April, 1946, was Dr. Edward K. Barsky a member of and chairman of the executive board of the Joint Anti-Fascist Refugee Committee?

That is the end of the question.

BY THE COURT:

Q. Do you desire to answer the question or do you desire to exercise the right to claim immunity under the Constitution? A. I claim the privilege against self-incrimination.

THE COURT: Self-incrimination. Any questions?

MR. ROGGE: No.

THE COURT: Very well. You may step down.

(Witness excused.)

258 MR. MURRAY: Dr. Miller.

Thereupon—

Louis Miller

was called as a witness by the United States, and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q Dr. Miller, your full name is Louis Miller? A Yes.

Q What is your address? A 411 West End Avenue, New York City.

Q I am going to put a question to you which you may refuse to answer on the ground that it might tend to incriminate you if you desire to make that claim.

On the 4th day of April, 1946, was Dr. Edward K. Barsky a member of and chairman of the executive board of the Joint Anti-Fascist Refugee Committee? A Is that the end of the question?

Q That is the question. A Well, I choose to refuse to answer the question on the ground that it might incriminate me.

BY THE COURT:

Q In other words, you assert your constitutional rights? A I do.

259 THE COURT: Very well.

MR. ROGGE: No questions.

THE COURT: You may step down.

(Witness excused.)

MR. MURRAY: Mrs. Stern.

Thereupon—

Mrs. Charlotte Stern

was called as a witness by the United States, and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q Are you Mrs. Charlotte Stern? A Yes.

Q Your full name is spelled C-h-a-r-l-o-t-t-e S-t-e-r-n?

A Yes.

Q What is your home address? A 423 West 120, New York City.

Q You are going to be asked a question which you may refuse to answer on the ground that it may tend to incriminate you, if you desire to make that claim.

On April 4, 1946, was Dr. Edward K. Barsky a member of and chairman of the executive board of the Joint Anti-Fascist Refugee Committee? A I would rather not answer.

260 BY THE COURT:

Q In other words, you desire to stand on your constitutional rights on the ground that it might tend to incriminate you? A Yes, sir.

THE COURT: Very well.

MR. ROGGE: No questions.

(Witness excused.)

MR. MURRAY: If the Court please, the remaining witnesses are persons as to whom the situation is different in a way in which the Government will contend.

MR. ROGGE: I am agreeable to proceed with the jury.

THE COURT: Did you say something?

MR. ROGGE: I am agreeable that the Government proceed with the jury and proceed with the trial, and I appreciate it is possible that these witnesses—I think it would suit the convenience of Mr. Fast to go back to New York.

THE COURT: Yes.

(Thereupon the jury was recalled into the courtroom and the following occurred:)

MR. MURRAY: Mr. Gleason, please.

If the Court please, this witness was served, and we received a notice that he was ill, and a letter to that effect, and we are satisfied that is correct.

THE COURT: Very well.

261 MR. MURRAY: Mrs. Kamsly, please.

Thereupon—

Mrs. Louis Kamsly

was called as a witness by the United States, and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q Mrs. Kamsly, will you state your full name? A Mrs. Louis Kamsly.

Q What is your home address? A 350 Central Park West, New York City.

Q In March and April, 1946, were you a member of the executive board of the Joint Anti-Fascist Refugee Committee? A Yes.

Q Where was the office of that association? A 192 Lexington Avenue, New York City.

Q When did you become a member of that board, Mrs. Kamsly? A I think it was in September or October of 1945, if I remember correctly.

Q Who were the other members in March and April, 1946, as you can now recall? A Mr. Gleason, Mrs. Weinstein, Mr. Shumlin, Dr. Tolmae, Dr. Auslander, Dr. Miller, Mr. McManus, Mrs. Leider, Mr. Bradley, Mrs. Stern, 262 Mr. Magana. That is about all I can remember at the moment.

Q And do you remember who the chairman was? A Dr. Barsky.

Q That was Edward K. Barsky, was it? A Yes.

Q Do you remember a Mrs. Chodorov? A Yes.

Q Was she a member of the board? A Yes, I think she was.

Q And Howard Fast? A Yes.

Q Mrs. Fleischman? A I am under the impression she was.

Q You don't know it? A I don't know it for a fact.

MR. ROGGE: Then I ask that the answer "I am under the impression," be stricken.

THE COURT: All right, it will be stricken, ladies and gentlemen.

BY MR. MURRAY:

Q Harry M. Justiz was a member? A I think he was.

Q Do you remember how many members there were

altogether? A Either 15, 16, or 17, I am not quite sure.

Q Now, did you appear, Mrs. Kamsly, before the
263 committee of the House of Representatives on Un-
American Activities on April 4, 1946? A Yes.

Q Did all those persons whose names you have given
appear also on that same day? A No, sir.

Q Which ones did not? A Mr. McManus did not.

Q Is he the only one who did not appear? A As far
as I can remember.

Q Of those you have named, I mean? A Yes.

Q Did Mrs. Fleischman appear on that day? A I
saw her in the ante room of the Un-American Activities
Committee.

Q You saw her with the others? A Yes, sir.

Q Now, did the executive board control the affairs of
the Joint Anti-Fascist Refugee Committee?

MR. ROGGE: Just a minute. Let's find this out from
the books and records, if the Court please. This witness
cannot give an opinion as to what the executive board did.
That is a legal conclusion.

MR. MURRAY: She was a member of the Board.

THE COURT: She knows what she was functioning
as.

264 MR. ROGGE: If she was a member of the board
and familiar with the activities of the board, and her
efforts—

THE COURT: All right, if you would rather have it
limited.

BY MR. MURRAY:

Q What is the purpose of the executive board of the
organization? A As far as I was concerned it was con-
cerned with fund raising mostly.

Q What other thing was decided upon by the executive
board? A At the meetings which I attended there was
practically nothing else discussed.

Q Did you attend any meeting in relation to the pro-
duction of records of the organization before the House

Committee in Washington April 4, 1946? A I don't think so.

Q How long have you known Mrs. Fleischman, Mrs. Kamsly? A I would say approximately five or six years.

Q Where did you become acquainted with her? A In the offices of the Joint Anti-Fascist Refugee Committee.

Q Did she attend meetings of the board to your 265 knowledge? A I am not sure whether I ever saw her at a board meeting.

Q Did you know Mrs. Mabel Pollock? A Yes, sir.

Q Was she a member of the executive board during that period of March and April, 1946? A Not to my knowledge.

Q Was Mrs. Blanche Möller? Did you know her? A Yes.

Q What did those ladies have to do with the association, if anything, that you know of?

MR. ROGGE: I object. I fail to see the relevance of that to this case. We have a couple of new names brought in here now.

Let's try the ~~case~~ before us, Your Honor.

THE COURT: I will give him that latitude.

THE WITNESS: Would you repeat it?

BY MR. MURRAY:

Q You are not talking into that thing, are you (referring to the microphone), so we might as well get it out of the way. A Would you mind repeating the question?

Q What connection, if any, did Mrs. Mabel Pollock have with the organization, Mrs. Kamsly? A She was a paid worker for the women's division.

266 Q And Mrs. Mohler? A Mrs. Mohler I think had no connection with the organization except in an advisory capacity and the fund raising.

Q And Mr. Kushman? Do you know him? A What is his first name?

Q Felix. A Yes, I know him.

Q What, if anything, did he have to do with the organization?

MR. ROGGE: If she knows.

BY MR. MURRAY:

Q If you know. A I don't know.

Q Did you attend a meeting of the executive board in December, 1945, in relation to the question of producing records of the organization before the House Committee on Un-American Activities? A In December?

Q 1945.

MR. ROGGE: I object on the ground that it is not relevant.

THE COURT: I will deny the objection.

THE WITNESS: I don't remember that, Mr. Murray.

BY MR. MURRAY:

Q Did you attend any meeting of the board in 267 relation to that subject? A I don't remember that.

Q Did you come to Washington from New York on April—I mean for your appearance on April 4 did you come down from New York City? A Yes, sir.

Q Did you come with Mrs. Fleischman? A No, sir.

Q When did you first see Mrs. Fleischman? A In the ante room of the House Committee on Un-American Activities.

Q Did you have in your possession a written statement to be presented to that committee? A Yes, sir.

Q Where did you obtain it? A From Mr. Benedict Wolf.

Q When in relation to April 4? A A few days before.

Q Did you go to his office for the purpose of getting it?

A I went to his office for the purpose of getting it.

Q Did you obtain that statement from him?

MR. ROGGE: I object to the leading nature of these questions.

MR. MURRAY: Well, she has already said that.

268 It is merely repetitious.

BY MR. MURRAY:

Q What other persons were there when you saw Mr. Wolf? A I saw Mrs. Weinstein, Dr. Tolmac, Mr. Shumlin and Mrs. Weinstein's husband, and there were other people around whom I wasn't acquainted with.

Q When was that? What date was that? A I couldn't remember the date, but it was a few days before.

Q A few days before April 4, 1946? A Yes.

Q Where was Mr. Wolf's office at that time? A At some place down on Broadway. I don't remember the address.

Q What time of day was it? A I went there in the evening.

Q I show you a paper, Mrs. Kamsly, which has been marked Government's Exhibit No. 2, and ask you whether that, or a paper like it was submitted to you and obtained in Mr. Wolf's office? A Yes.

MR. MURRAY: I offer this in evidence.

MR. ROGGE: I object on the ground of irrelevance.

I have seen it.

269 THE COURT: It will be received.

(Thereupon statement of witness Kamsly was by the Court received in evidence as Government's Exhibit No. 2.)

MR. MURRAY: May I read it?

THE COURT: Yes.

MR. MURRAY: Members of the jury, I am reading to you what was marked Government's Exhibit No. 2:

"Mr. Chairman, I have been served with a subpoena requiring me to appear to testify and produce certain books, records and correspondence of the Joint Anti-Fascist Refugee Committee in my custody and control. I personally do not have the custody and control of such records. The books, records and correspondence of the Joint Anti-Fascist Refugee Committee are in the possession, custody and control of Miss Helen R. Bryan, the executive secretary of our organization, and she is the legal custodian of this material. Since I do not have either in my posses-

sion, custody or control the books, records and correspondence of the Joint Anti-Fascist Refugee Committee I am unable to comply with the order to produce them."

BY MR. MURRAY:

Q Mrs. Kamsly, did you know that Miss Bryan had previously appeared before the committee and had
270 not produced records? A Yes.

Q And that Dr. Barsky had likewise appeared before them and had not produced? A I had heard that.

Q You knew that the records had not been produced by any member of the organization?

MR. ROGGE: I object. Her knowledge has nothing to do with this. We are talking about another occasion.

THE COURT: I will overrule the objection.

BY MR. MURRAY:

Q You knew that the records had not been produced before the committee by anybody, did you not? A I think I did.

Q To your knowledge did Mrs. Fleischman know that? A I wouldn't know.

Q On April 4th did you know that there had been a meeting of the executive board at which it had decided not to produce records before the congressional committee?

MR. ROGGE: May I have the question read?

:(The question was read by the reporter.)

MR. ROGGE: I object, that the best evidence of that would be the records of the particular meeting.

MR. MURRAY: If there was such.

THE COURT: If she was present, she can state.

THE WITNESS: I do not believe I was present; one, the only vote I gave was over the telephone, which had nothing to do with the production of records, strictly about custodianship.

BY MR. MURRAY:

Q Custodianship of what? A The books and records.

Q Now, was that meeting in which you participated by

telephone, was that a meeting before the appearance here in Washington? A I believe it was.

Q And was it in relation to the appearance in Washington? A No.

Q What was it in relation to, to the best of your present recollection, Mrs. Kamsly?

MR. ROGGE: I object. She stated what she voted for. This is repetition.

THE COURT: I will let her answer it.

THE WITNESS: It was in relationship to transferring of the books and records from the legal custodian, Miss Helen Bryan, to Dr. Barsky, the chairman.

BY MR. MURRAY:

Q And at that time had Dr. Barsky been subpoenaed to produce the records? A I don't remember.

272 Q Do you remember Miss Bryan had, previous to that time, come down and refused to produce?

MR. ROGGE: I object. This is personal knowledge, and how could this witness have personal knowledge of what Miss Bryan did unless she was there and saw it.

THE COURT: Read the question.

(The last question was read by the reporter.)

BY THE COURT:

Q Do you know? A I remember when she had come down.

BY MR. MURRAY:

Q And do you remember at the time of the telephone conversation to which you have referred, the question was on Dr. Barsky's coming down and whether he should produce records? A No, sir, it was not.

Q You say it was in relation to changing the custodianship of the records from Miss Bryan to Dr. Barsky? A Yes.

Q Was that in relation to Dr. Barsky's coming down in answer to a subpoena to produce the records?

MR. ROGGE: I object to the leading nature of these questions, if Your Honor please. He could ask her if it

was with reference to what she voted on. I don't think it is relevant, and I do object to the nature of the last
273 line of questions.

THE COURT: All right.

BY MR. MURRAY:

Q Now, when you appeared here on April 4 with the others who you have mentioned, Mrs. Kamsly, was Mr. Wolf with you? A Yes.

Q Did the others, to your knowledge, have statements like the one you obtained? A I saw a couple, I don't know how many.

Q And now, when you went in as a witness yourself before the Congressional committee that day, did you submit your paper writing that you had obtained from Mr. Wolf?

MR. ROGGE: I object. What materiality does that have here?

THE COURT: I will permit it.

THE WITNESS: Pardon?

BY THE COURT:

Q Did you, or did you not, turn that paper in? A Yes, I did.

MR. MURRAY: That is all.

Cross Examination

BY MR. ROGGE:

Q Mrs. Kamsly, you mentioned something about voting on transfer, and I just wanted to understand, I
274 didn't get it quite clearly, just what did you vote for? A I voted not to transfer the custodianship of the books from Miss Helen Bryan, who was the legal custodian, to Dr. Edward Barsky.

Q And that is the telephone vote you were telling us about? A That is the telephone conversation that transpired, and only that.

MR. ROGGE: That is all.

Redirect Examination

BY MR. MURRAY:

Q Just one other question along that line.

Do you remember whom that conversation was with?

A I am under the impression it was with Miss Bryan, but I am not certain.

MR. MURRAY: That is all I have to ask.

MR. ROGGE: That is all, witness excused.

MR. MURRAY: Your Honor, so far as I am concerned, this witness may be excused.

MR. ROGGE: That is agreeable.

THE COURT: Mrs. Kamsly, you may be excused, if you so desire.

THE WITNESS: Thank you.

MR. MURRAY: Mr. Shumlin.

275 Thereupon—

Herman Shumlin

was called as a witness on behalf of the Government and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q Mr. Shumlin, your name is Herman Shumlin? A That is correct.

Q And you spell that S-h-u-m-l-i-n? A Yes, sir.

Q Will you give your home address, please, sir? A Wilton, Connecticut.

Q Mr. Shumlin, during March and April 1946, were you a member of the executive board of the Joint Anti-Fascist Refugee Committee? A I was.

Q And who was the chairman of the board?

MR. ROGGE: I object on the ground of repetition.
THE COURT: He may state.

THE WITNESS: I believe it was Dr. Barsky.

BY MR. MURRAY:

Q In the interest of time saving I will ask this question, if I may, as a group:

I will ask you, Dr. Shumlin, whether there were members of the executive board, and I am now going to state 276 their names if there is no objection.

MR. ROGGE: When counsel finishes it, I want to list an objection.

THE COURT: Then you may go one by one.

MR. MURRAY: You mean as to form?

MR. ROGGE: Yes.

MR. MURRAY: I think it is objectionable if you want to object.

BY MR. MURRAY:

Q Was Dr. Auslander a member of the executive board? A Yes.

Q Was Lyman R. Bradley a member of the executive board? A Yes.

Q Was Howard Fast a member of the executive board? A Yes.

Q Was Ernestina Fleischman a member of the executive board? A Yes.

Q Was Walter Gleason? A Yes.

Q Was Harry M. Justiz? A Yes.

Q Was Mrs. Kamsly? A Yes.

277 Q That was Mrs. Kamsly that just left the stand? A Yes.

Q Was Mrs. Ruth Leider? A Yes.

Q Was James Lustig? A Yes.

Q Was Manuel Magana? A Yes.

Q Was Louis Miller, Dr. Miller? A Yes.

Q Was Mrs. Charlotte Stern? A Yes.

Q Was Jesse Tolmac? A Yes.

Q And was Mrs. Bobbie Weinstein? A Yes.

Q Were there any other members in the group than those? A I can't recall any.

Q Did you attend the meetings of that executive board?
 A I attended one meeting I believe in March.

BY THE COURT:

Q What year? A 1945—'46.

BY MR. MURRAY:

Q Did you come to Washington, Mr. Shumlin to
 278 appear before the Committee on Un-American Activities on April 4, 1946? I came the day before.

Q You arrived here the day before? A Yes.

Q And where did you come from? A From New York.

Q Did you come with others? A I believe I did, yes.

Q Will you name them, please? I will ask you, first, did you come with any of those whose names we have been talking about here? A Yes.

Q All right, name those that you came with among that group.

MR. ROGGE: I object. It has no relevance to this case.

THE COURT: I will admit it.

THE WITNESS: I am not positive, but I believe Mrs. Weinstein, and I think Dr. Tolmae and I came down together. I don't remember any of the others in this group.

BY MR. MURRAY:

Q Did you bring with you a written statement for presentation to the committee? A No.

Q Did you obtain any such written statement before you actually appeared? A I can't remember whether I was given a statement or not. I know I didn't have one when I was here.

Q And do you recall whether a few days before you had visited the office of Mr. Wolf? A I did; I don't know exactly when.

Q What others in the group of individuals whose names we have mentioned, if any, were there when you were there? A It is very difficult for me to recall that. I have

a memory that I saw Mr. Gleason, and I think Dr. Tolmac. I couldn't really say that I saw anybody else, I don't remember.

Q Did you see Mrs. Fleischman at the committee in the antechamber of the committee room in Washington on April 4 when you came to Washington and appeared before the House committee on April 4, was Mrs. Fleischman there to your knowledge? A Yes.

Q Where did you first see her? Where was she when you first saw her that day? A In the room in the building there.

Q Do you mean the waiting room just outside the committee room? A I believe so.

Q And were there others whose names I have 280 read to you, were they there, too? A Yes. May I volunteer on a question which you asked me before, which I just remember?

Q What question was it, sir? A You asked me if there were any people of those you mentioned, sixteen persons, and I remember there was a certain Mr. McManus.

Q Mr. McManus, was he there on April 4? A No.

Q In Washington I mean? A No.

Q Did you attend any of the meetings of the Joint Anti-Fascist Refugee Committee in relation to the production of its records before the Congressional committee? A No, I don't remember any such meeting.

Q And did you attend any meetings of the board on any business? A There were several meetings. I don't believe all the members were present. We discussed the legal aspect and the problem of engaging an attorney.

Q You mean in connection with what? A With this case, in connection with the appearance before the committee.

Q In connection with the appearance before the Congressional committee? A Yes.

281 Q And did you attend a meeting of the board at which that was discussed?

MR. ROGGE: This witness has referred to various meetings. I think before we proceed that he should get the dates and places if he can remember them.

THE COURT: All right, sir.

BY MR. MURRAY:

Q The meeting that you seem to remember, will you fix the date as best you can? A We were subpoenaed to appear before the committee on April 4th, and I believe that I was served with a subpoena the previous week, what day I don't remember. I think it was less than a week before. When this meeting took place, I do not exactly know. It was between those two dates.

Q Where was that meeting held? A A few of us met at the home of Mrs. Weinstein.

MR. ROGGE: Let's see whether this is a board meeting. If this is a little private meeting between those people, it has nothing to do with it.

THE COURT: All right.

BY MR. MURRAY:

Q Did you understand you were being asked about a meeting of the executive board? A This was not a meeting of the executive board.

MR. ROGGE: Then I object.

282 MR. MURRAY: I won't go into that.

THE COURT: Very well.

BY MR. MURRAY:

Q I will ask you this question:

Was Mrs. Fleischman one of those you met with?

A I don't remember her being there.

Q I don't remember whether I asked this. If I did, the Court will permit the repetition perhaps.

Mr. Shumlin, do you recall whether there was any meeting of the board which you attended in relation to producing or not producing its records before the Congressional committee? A No, I don't. I remember—it is rather a question—there was reference to—the one meeting I know about there wasn't a demand on the board of the committee as far as I know.

THE COURT: I didn't understand.

MR. MURRAY: There wasn't a demand on the board; the only meeting he knows about there was not any demand on the board.

BY MR. MURRAY:

Q That meeting you are talking about, was it a meeting of the executive board and not just a few people? A Yes.

Q But you did attend it? A Yes.

Q Do you remember when it was in relation to
283 the date of April 4th? A It was, I am pretty sure, some time in March.

Q All right. Now, was that in relation to the production, the producing or not producing of the records of the organization before the Congressional committee in Washington?

MR. ROGGE: Objection. The minutes of the meeting would be the best evidence of what took place.

THE COURT: If he was there he may answer.

THE WITNESS: Will you repeat the question?

BY MR. MURRAY:

Q I will reframe it. It may have been a little confusing the way I put it.

Was that meeting in relation to the question of whether the Joint Anti-Fascist Refugee Committee would produce or would not produce those records before the Congressional committee in Washington?

MR. ROGGE: I object. It is leading, and I think counsel should ask what took place rather than stating it in the form of a leading question and putting it in the witness's mouth.

THE COURT: I think the witness has already answered the question that he did attend the meeting with reference to the records of the Joint Anti-Fascist Refugee Committee. Is that correct?

THE WITNESS: Yes.

MR. ROGGE: Is that the meeting?

284 THE WITNESS: Yes.

THE COURT: Is that the meeting you are talking about?

MR. ROGGE: Yes.

BY MR. MURRAY:

Q Now, was Mrs. Fleischman present at that meeting?
A I believe she was.

Q What other board members were present at that meetings? A It would be difficult for me to say what others were present then. It would seem to me that more or less the whole board was present.

Q Do you recall whether Mr. McManus was there? A No, I don't remember.

Q Were the others whose names I have mentioned there? A I can't specifically state, as I have said.

BY THE COURT:

Q Let me see if I understand, Mr. Shumlin. I understand you to say more or less of the executive board were there? A Yes.

Q Is that correct, sir? A Yes.

THE COURT: I didn't follow that question.

MR. MURRAY: It was more or less repetitious. I had first asked about Mr. McManus, and then the others separately.

285 THE COURT: All right.

BY MR. MURRAY:

Q Mr. Shumlin, do you now recall what was decided at the meeting? A There was nothing decided at the meeting.

Q What would you say the action was taken, if any? A None, that I remember at all. Mr. Barsky reported about his appearance before the Un-American Activities Committee in Washington, and the attorney was present and talked to us about the legal aspects of the situation.

Q Was Miss Bryan there? A I think so.

Q Did she say anything to the meeting that you recall? A I don't remember if she did.

Q Do you remember whether she reported on her own appearance? A I don't remember.

Q And now, do you remember when it was Dr. Barsky had appeared here? A No, I don't. I remember vaguely about it. I know it was some time before that meeting. How long before I don't know.

Q And now, was this meeting before you received your subpoena? A Yes.

286 Q And now, after you received your subpoena, before appearing, did you attend any meeting except that little group meeting in Mrs. Weinstein's home? A I don't remember any.

Q So far as you can recall there was no executive board meeting during that entire time? A That's right.

MR. MURRAY: That is all I have to ask.

Cross Examination

BY MR. ROGGE:

Q Mr. Shumlin, I just want to be sure I understood some of your statements correctly.

You don't recall if you had a written statement, but if you had you didn't use it, is that right? A Yes, that is right.

Q You referred to McManus, is that John McManus? A Yes.

Q Is that the same one who was the head of the New York Newspaper Guild? A That's right.

Q And now, in this appearance on April 4th, the people you mentioned appearing here, they appeared here because they had all been subpoenaed, didn't they? A Yes.

Q Just as a group of you are appearing here 287 today because you have all been subpoenaed, is that right? A That is right.

Q And now, as to this meeting, and you testified about one, as I recall, which took place in 1946? A Yes.

Q Did I understand you correctly that no action was taken at that meeting? A That's right.

Q You mean you listened to a report by Dr. Barsky, but took no action in the form of a resolution or otherwise?
 A As I recall it.

Q Now, can you tell the names of those who were members at that meeting? A It would be very difficult to recall them.

Q Are you sure Ernestina Fleischman was there? A I am pretty sure, I think she was there.

Q You have a vague impression that she was, is that right?

THE COURT: No, that is not what he said.

MR. ROGGE: This is cross examination.

THE COURT: Yes, but you want to state the facts.

BY MR. ROGGE:

Q You go ahead. A I think she was there.

288 Q Do you remember if she said anything? A I don't remember if she said anything.

Q Do you remember her saying anything at any meeting at which you saw her? A No.

MR. ROGGE: Will Your Honor indulge me a moment?

THE COURT: Yes.

BY MR. ROGGE:

Q Now, you have also mentioned that these people were all in this anteroom, that is, there is an anteroom that was the room going into the committee of the House committee on Un-American Activities, wasn't it? A Yes.

Q And the subpoena you got required the people to be at that place at that particular time, didn't it? A Yes.

MR. ROGGE: That is all.

MR. MURRAY: That is all. May this witness be excused?

MR. ROGGE: That is agreeable.

THE COURT: You may be excused.

(Witness excused.)

MR. MURRAY: Dr. Tolmac.

Thereupon—

Jesse Tolmac

was called as a witness on behalf of the Government and, being first duly sworn, was examined and testified as follows:

289

Direct Examination

BY MR. MURRAY:

Q Dr. Tolmac, your first name is Jesse? A That's right.

Q T-o-l-m-a-c? A That's right.

Q What is your home address? A 150 West 80th Street, New York.

Q Were you a member of the executive board of the Joint Anti-Fascist Refugee Committee in March and April 1946? A Yes, sir.

Q Was Mrs. Fleischman to your knowledge a member? A I believe she was.

Q Did you attend meetings of that board, sir? A I hadn't been to a meeting for at least two years prior to I think somewhere in March 1946, at least two years.

Q Did you attend the meeting of the board in March 1946? A Yes.

Q What was that in relation to? A I just don't remember all the details, but it was a report on what had occurred, I think, in Washington when Dr. Barsky was here. Also the attorney told us something about the legal position of the committee, something like that. I don't remember all the details.

290 Q Legal position of what committee? A The Joint Anti-Fascist Refugee Committee.

Q Of your organization? A Yes.

Q Do you recall whether any action was taken by the board on that occasion?

MR. ROGGE: I object. The record would be the best evidence. The second ground, it is repetition.

THE COURT: If he knows he may state.

THE WITNESS: I don't remember exactly.

BY MR. MURRAY:

Q All right. Now, did you appear in Washington—

THE COURT: I didn't hear exactly what you said.

You don't know exactly, or did you know in substance what you discussed?

THE WITNESS: Yes, there was a report by Dr. Barsky and a discussion by the lawyer as to the legal aspect of the case. I remember that.

BY MR. MURRAY:

Q The legal aspects of what case? A The question as to our position in this matter. We were all quite apprehensive.

Q What matter is that?—is what I am talking about. Would you state what matter you were talking about in that meeting? A The meeting of the subpoena of 291 Dr. Barsky, and the question of the records, that was discussed.

Q Now, do you recall whether Miss Helen Bryan was present at that meeting? A I believe she was.

Q Do you recall whether she took any part in that meeting, or made any report? A I don't at this minute. I could be refreshed if I saw the minutes, but I don't know.

Q Do you recall whether Mrs. Fleischman was present at the meeting? A She might have been. I do not recall specifically.

Q Now, how many members were present at that meeting, if you recall? A I would say a majority.

Q Would you give us an estimate of the number? A I don't know how to answer.

BY THE COURT:

Q How many were subpoenaed at the committee, do you know? A The only members I remember are those that were subpoenaed, and I believe there were 16 or 17.

Q All right. Now you say a majority. What do you deem to be a majority? A I suppose over ten.

BY MR. MURRAY:

292 Q Do you recall whether other members were consulted by telephone to participate at that meeting? A Which meeting?

Q The one you are talking about. A That I don't know.

Q Now, how long was that, if you can tell us, before April 4th when you came down here? A I think that meeting was in March, and we came down April 4th.

Q Do you recall what part of March the meeting was in? A Not exactly.

Q Where did you—I will withdraw that question.

Did all the members of the board appear in Washington on April 4th?

MR. ROGGE: Just a minute, I object to that, leading, every question. Let him state who was here.

BY THE COURT:

Q If you knew who appeared here you may state. You were here, sir? A I was here.

Q All right, sir, who else? A It seems to me everybody who was subpoenaed was there.

BY MR. MURRAY:

Q I will ask you about these names, if I may:

293 Q Was Dr. Auslander there? A Yes.

Q Professor Bradley? A I believe.

Q Mrs. Chodorov? A I think so.

Q Howard Fast? A I believe all of them were there.

Q You believe all of them? A That were subpoenaed.

Q Mrs. Fleischman was there, was she? A I think so.

Q When did you first see her that day? Where did you see her first? A The only possible recollection I might have would be at the offices of the Committee on Un-American Activities.

Q Did you come down here from New York yourself?

A No.

Q Did you come alone? A No, sir.

Q What other members of the board came with you, do you remember? A Mr. Gleason, Mrs. Weinstein, and Mr. Shumlin.

Q Did you have any prepared written statement
294 with you? A Yes.

Q Where had you obtained it? A Mr. Wolf's office.

Q How long before April 4th? A I don't remember the date.

Q Was it shortly before, or a long time before? A It couldn't have been too long before.

Q I will ask you this: Was it before or after you received your summons to come here? A I don't remember.

Q When you went to Mr. Wolf's office was Mrs. Fleischman there? A I do not recall her presence there.

Q You don't recall seeing her there? A That's right.

Q Did you see any other members of the board there that you now remember? A I just have a recollection of people coming in and going out. I can't center on any one individual I know was there.

Q Now, was Miss Bryan one of those who appeared before the committee on April 4th? A Yes, sir.

Q Do you recall when she appeared before the
295 committee in relation to the others? A I don't know what you mean.

Q Was she the first or last to appear, or in between? A On that day!

Q Yes. A It seems to me she was the last.

MR. MURRAY: That is all I have to ask.

Cross Examination

BY MR. ROGGE:

Q Did I understand you correct, Mr. Tolmac, that you had not been at a board meeting for two years? A I believe so. I think it is at least two years.

Q Well, how did you know the board members if you hadn't been there for two years? A I assumed the members of the board were present when we were subpoenaed, that is, officially I believe they had all been subpoenaed, and I took it for granted that all present in Washington were board members.

Q Now, John McManus was a board member too, wasn't he? A Yes.

Q He wasn't down here in Washington, was he? A No, sir.

Q Now, you want us to understand that your testimony that Ernestina Fleischman was a member of the board stems from the fact that she was here in Washington the same day you were, and you assumed she was a member. 296 A I assumed she was a member. I didn't know of her having any different position than as a board member.

Q You don't recall ever seeing her at a meeting, do you? A I can't specifically say yes.

Q You can't recall her saying anything with reference to any proposition or resolution, can you? A No, sir.

MR. ROGGE: Will Your Honor indulge me a moment? That is all.

MR. MURRAY: (That is all. May Dr. Tolmac be excused, if Your Honor please?)

MR. ROGGE: That is agreeable.

THE COURT: You may be excused.

(Witness excused.)

MR. MURRAY: Mrs. Weinstein will be the next. Thereupon—

Mrs. Bobbie K. Weinstein

was called as a witness by the United States, and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q Mrs. Weinstein, will you please state your full name?

A Mrs. Bobbie K. Weinstein.

297 Q You spell that B-o-b-b-i-e? A Yes.

Q What is your address? A 211 Central Park

West.

Q New York City? A Yes.

Q Were you a member of the Joint Anti-Fascist Refugee Committee executive board? A Yes, sir.

Q Was Mrs. Fleischman to your knowledge also a member? A Yes.

Q Did you appear with the others in Washington on April 4, 1946? A Yes.

Q Before appearing was there, to your knowledge, any meeting of the executive board in relation to their appearing? A No, sir.

Q You did not attend any meeting yourself— A (Interposing) No, sir.

Q (Continuing) —is that correct? A Yes.

Q When did you first see Mrs. Fleischman on that day, or, first, I will ask you where? Did you see her at any place before you saw her at the committee room, or 298 outside the committee room? A I am not certain I understand the question.

Q Where did you first see Mrs. Fleischman that day you appeared before the committee? A April 4?

Q Yes. A As I remember, in the Un-American Activities Committee office, in the anteroom.

Q And did she, to your knowledge, appear there as a witness? I mean, was she called in as one of the persons to appear before that committee? A Yes.

Q And you did, too? A Yes.

Q Did you have any prepared written statement to present to the committee? A Yes.

Q Was it like the one I show you, which is Government's Exhibit No. 2 (handing document to witness)? A Yes, I mean this is like my statement.

Q I am asking you whether the prepared statement was like the one you are now looking at? A As I remember.

Q Did you present it to the committee? A Yes.

299 Q Where had you obtained it? A At Mr. Wolf's office.

Q How long before April 4, 1946? A I think just before.

Q When you were in his office did you see Mrs. Fleischman there?

MR. ROGGE: I object to the leading question.

THE COURT: All right, but was there a time you appeared at Mr. Wolf's office that there were many people there you knew?

THE WITNESS: The ones I remember who were there were Dr. Barsky, Dr. Gleason, Mrs. Kamsly. I don't remember others.

THE COURT: You don't remember anybody else?

THE WITNESS: Not at this moment I don't.

BY MR. MURRAY:

Q How long have you known Mrs. Fleischman, Mrs. Weinstein? A About five years.

Q Did you attend meetings of the executive board on any subject? Did you attend any of the meetings of the board yourself? A Yes.

Q And at times did you attend any meeting in relation to the question of producing, or not producing, records of the Joint Anti-Fascist Refugee Committee before the 300 Congressional Committee in Washington? A No, not that I remember.

Q Did you ever see Mrs. Fleischman at a meeting of the board? A Not that I remember.

Q Now, did you participate in any meetings of the board by telephone rather than personal appearance?

MR. ROGGE: I object. It has no relevance, and it is repetition.

THE COURT: She may answer.

THE WITNESS: Are you referring to any particular meeting?

BY MR. MURRAY:

Q Any meetings. A Not that I remember.

MR. MURRAY: That concludes the direct examination.

MR. ROGGE: No questions, if the Court please.

THE COURT: Do I understand, gentlemen, this witness is excused now?

MR. ROGGE: That is agreeable to me.

MR. MURRAY: Yes.

THE COURT: All right.

(Witness excused.)

THE COURT: Suppose we recess, gentlemen, at this point for a period of about five minutes.

301 Gentleman of the jury and alternate juror, we will recess with the same admonition heretofore given to you which is, namely, you are not to permit anyone to talk to you about this case, nor discuss it among yourselves, nor will you read anything in the newspaper, or listen to anything on the radio. With that you are excused for ten minutes.

(Thereupon a short recess was had. The following then occurred:)

MR. ROGGE: May we approach the bench?

THE COURT: Yes.

(Thereupon counsel approached the Court's bench and out of the hearing of the jury the following occurred:)

MR. ROGGE: While we were standing outside here I walked up to one of the jurors, not knowing he was in this case, as a matter of fact, I thought he was a juror in the Christoffel case, and said, "I suppose the Christoffel case was the longest case you had when you were sitting," and he said, "Christoffel case?" and sort of shook his head, and Mr. Wolf pointed out that it was one of the jurors here. I am so little acquainted with this jury I was a little confused, but I wanted to report it to the Court.

MR. MURRAY: He mentioned it to me before and I see nothing wrong about it.

THE COURT: All right, sir.

(Thereupon counsel returned to the trial table and 302 in the hearing of the jury the following occurred:)

MR. MURRAY: See if Mrs. Pollock is there.

Thereupon—

Mrs. Mable Pollock

was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q Mrs. Pollock, will you state your full name, please?

A Mrs. Mable Pollock.

Q P-o-l-l-o-e-k? A Yes, sir.

Q What is your home address? A 470 West 42nd Street, apartment 3, New York.

Q Are you employed at this time? A Yes.

Q What is your employment? A I am employed by the Joint Anti-Fascist Refugee Committee.

Q How long have you been employed by that committee? A I think about six and one-half years.

Q Have you at any time been a member of the executive board of that organization? A Never.

303 Q Have you attended meetings of that board? A I have attended meetings, but I don't know that they were board meetings.

Q Have you attended meetings without voting? Have you participated in discussions in meetings and not voted?

A I have never voted.

Q You have never voted, but have you participated in meetings, that is, by entering into the discussion? A Yes.

Q Were there, to your knowledge, any meetings of the board of the Joint Anti-Fascist Refugee Committee in relation to the question of producing records before the Congressional Committee in Washington?

MR. ROGGE: I object to this question because this witness has testified that although she may have been at meetings she didn't know whether they were board meetings, or not.

THE COURT: Suppose we find out who was present, Mr. Murray, if she knows.

BY MR. MURRAY:

Q Mrs. Pollock, before the date of April 4, 1946, that would be during March and February, 1946, were there any meetings of the kind you had in mind that you attended?

A I can't remember the date of the meetings.

Q All right. Now, I will ask you at the meetings that you did attend who were present? A I can't remember everybody who was present.

304 Q Well, are you referring to various meetings, or any particular one? A Well, I can't specify exactly the time of any meetings that I attended.

BY THE COURT:

Q Do you know who the members of the executive board were in March and April, 1946? A I don't know exactly who were members.

Q No, madam, I am just asking you a simple question: Do you know who the members of the executive board of the Joint Anti-Fascist Refugee Committee were in 1946, the first part of the year? You have been there six and a half years. A Yes.

Q All right, now do you know who they were? A I don't know which were members of the board and which were outsiders, as I was.

BY MR. MURRAY:

Q Did Mrs. Fleischman attend meetings? A The meetings I attended?

Q Those that you know about which, of course, would be those that you attended. A I think Mrs. Fleischman was present. I don't remember exactly.

305 Q You know Mrs. Fleischman? A Yes.

Q How long have you known her? A I think I have known Mrs. Fleischman perhaps not for the full length of time that I was employed by the committee, but the most of the time that I was employed.

Q Did you know Dr. Edward K. Barsky? A Yes.

Q What was he to your knowledge? A He was the national chairman.

Q. Of what? A. Of the Joint Anti-Fascist Refugee Committee.

Q. Did you know Dr. Auslander? A. Not at that time.

Q. Do you know him now? A. Yes.

Q. You mean you have become acquainted with him since two years ago? A. Yes.

Q. Did you know Professor Bradley? A. Yes, I have known Professor Bradley.

Q. Was he, to your knowledge, a member of the executive board? A. I am not sure I know at that time that he was.

Q. I am asking you now whether he ever was.

306 MR. ROGGE: Just a minute, we are talking about her personal knowledge as of that particular time, and either she knew in February and March or April, or she didn't know. If she has gotten knowledge later let's find out whether it is hearsay, or not.

BY THE COURT:

Q. Do you know whether he was in March or April? A. I stated before that I don't remember whether I knew it at that time.

Q. Do you remember when you first knew? A. Not the exact date, no.

Q. Do you know the approximate date? Do you know the month? A. No.

Q. What was your position with this committee? A. I was the fund raiser for the women's division.

Q. And you didn't know who the executive board members were? A. No.

BY MR. MURRAY:

Q. Was Mrs. Chodorov a member? A. Yes.

Q. Of the executive board? A. Yes, sir.

Q. Mr. Fast, Howard Fast, was he a member? A. I don't remember whether I knew at that time.

307 Q. Was Mrs. Fleischman a member? A. I don't know that I knew at that time.

Q Was Mr. Gleason a member? A Yes.

Q And was Mr. Justiz a member? A I don't know.

Q Was Mrs. Kamsly a member? A Yes.

Q Was Mrs. Leider a member? A I think I knew that Mrs. Leider was a member.

Q Was Mr. James Lustig a member? A I didn't know at that time.

Q Was Manuel Magana a member? A I think that I knew that Mr. Manuel Magana was a member.

Q Was Dr. Louis Miller a member? A Yes.

Q And was Mr. Herman Shumlin a member? A Yes.

Q Was Mrs. Charlotte Stern a member? A I don't remember if I knew at that time.

Q Was Dr. Jesse Tolman a member? A Yes.

Q And was Mrs. Bobbie Weinstein a member? A Yes.

308 Q Now, did those persons whom you have just now identified as members of the board appear at any meeting in relation to the production of any reports of the committee before the committee, the House Committee on Un-American Activities? A I don't remember what took place at the meetings that I attended—

Q (Interposing) Were there any meetings that—
MR. ROGGE (interposing): Just a minute. I don't know whether she had finished.

BY MR. MURRAY:

Q Have you finished? A Yes.

Q Were there any meetings in relation to the production, or non-production of records before the Congressional Committee that you attended?

Q I just stated that I don't remember what was discussed at the meetings that I did attend outside of—I do remember campaign plans and funds of which the activities were discussed there.

Q You mean that there was no meeting in relation to the production of records that you attended? A I don't mean that, but there has been so much discussion of this

whole case that I don't remember what was discussed at the meetings that I attended.

309 BY THE COURT:

Q You didn't have an understanding of the basic subject of discussion of these meetings you attended other than you have just stated? A That is correct.

Q In other words, one of the general subjects of presentation of records was discussed when you were present?

A I don't remember that.

Q I am not asking you if you remember the detail of it, but the subject. A No.

Q You don't remember that? A No.

THE COURT: All right.

BY MR. MURRAY:

Q I will ask you if you attended a meeting of the executive board of the Joint Anti-Fascist Refugee Committee on February 11, 1946, at which it was decided unanimously by the board to instruct Dr. Barsky not to produce records before the Congressional Committee?

MR. ROGGE: I object to the question.

THE COURT: I think he has exhausted this witness, Mr. Rogge. I think it is time that he asked something of a specific character.

MR. ROGGE: Then I think counsel has now 310 attempted to state what his recollection is of what took place at a particular meeting, and I think he is referring to a meeting as to which he has already admitted at the bench is not relevant.

THE COURT: I don't recall that.

MR. ROGGE: Because Mrs. Fleischman was not there and was not reached by telephone, and had nothing to do with it and, as I recall his statement at the bench, it is either 36-A or B—

MR. MURRAY: I withdrew two of my offers at that time.

MR. ROGGE: And this is one of them.

MR. MURRAY: Because of the position Mr. Rogge

took, but I did not say that they were not relevant, heavens.

MR. ROGGE: I understand Mr. Murray withdrew them because they were not relevant.

THE COURT: That is not my recollection. You objected because they were not proven properly.

MR. ROGGE: And also because they were not relevant.

THE COURT: All right. Now you also make the objection of relevancy at this time, sir?

MR. ROGGE: Yes, I also make that objection.

THE COURT: All right, sir; I deny it.

MR. MURRAY: Read the question.

THE REPORTER (reading): "Question: I will ask you if you attended a meeting of the executive board of the Joint Anti-Fascist Refugee Committee on February 11, 1946, at which it was decided unanimously by the board to instruct Dr. Barsky not to produce records before the Congressional Committee?"

THE WITNESS: I don't think so.

BY MR. MURRAY:

Q I will ask you to look at this document I show you for the purpose of refreshing your recollection; having glanced at that, or read that document, do you have any other answer to make to the question whether you attended such a meeting? A (After inspecting document:) I must have been present, then.

Q Was Mrs. Fleischman to your knowledge there? A I don't remember, and I didn't read carefully enough. I noticed that a number of the board members voted in absentia, should I say?

Q All right. So to clear that up, she is not included among those who did, nor among those who were there.

Do you remember the occasion of various members of the board being summoned to appear in Washington on April 4? A (Witness nods head affirmatively.)

THE COURT: The answer was "Yes." You will have to speak so that the reporter can get it, madam.

THE WITNESS: I am sorry.

BY MR. MURRAY:

312 Q Did you come down with them? A I came down when Miss Helen Bryan came down. I did not come down when the board members were coming.

Q Didn't Miss Bryan come down when they did also, in addition to her coming down by herself earlier? A Yes, but I didn't come down when the board members came down.

Q That would be April 4, you weren't with them? A No.

Q Now, when Miss Bryan appeared did she, to your knowledge refuse to produce the records to the committee?

A Yes.

Q Now, to your knowledge, did Mrs. Fleischman know that? A I have no way of knowing that.

Q You never told her yourself? A No.

Q And you never discussed it with her? A No.

Q Do you recall what month that was in? A No.

Q Do you remember the occasion of Dr. Barsky coming down in relation to records? A Yes.

Q Now, was that after or before Miss Bryan 313 came by herself? A I think Dr. Barsky came afterwards.

Q Yes. Now, wasn't it on that occasion that he came under instructions of the board not to produce records?

MR. ROGGE: Now, I object as to what he came under, if the Court please.

THE COURT: If she knows she may answer.

Do you know?

THE WITNESS: I don't know.

BY MR. MURRAY:

Q All right. Do you know whether the meeting of the board at which he was instructed not to produce the records took place in connection with this appearance at that time? A I don't know.

Q. Do you recall a few days after that meeting he did come down and did not produce the records?

MR. ROGGE: If the Court please, I am objecting to these questions because these questions assume a certain meeting that is not in evidence.

THE COURT: Of what importance is that, Mr. Rogge?

MR. ROGGE: He is referring to a meeting of February 11 which has not been placed in evidence here by anybody.

THE COURT: I think this witness has stated her memory was refreshed and she was there.

MR. ROGGE: Having seen her name, and his
314 question is as to a certain meeting that she wasn't
at?

THE COURT: Let her answer if she knows.

MR. ROGGE: But she wasn't—

THE COURT: Let her answer for herself. I don't think you should testify for her.

BY MR. MURRAY:

Q. Do you know the question? A. No, I don't know your question.

Q. I will repeat it, then.

Do you know whether it is a fact that Dr. Barsky appeared before the House Committee and refused to produce records in accordance with this meeting of the board to which you have already made reference in your own testimony.

MR. ROGGE: I object to this unless she has personal knowledge.

THE COURT: All right, if she knows.

Do you know whether he did, or not, madam?

THE WITNESS: Only by what was told me. I wasn't present.

THE COURT: By whom, by Dr. Barsky?

THE WITNESS: No.

THE COURT: All right.

BY MR. MURRAY:

Q Do you mind repeating your connection with the organization? What is the title of your position?
 315 A I am executive secretary of the women's division.

I would like to explain to the Court that the reason—

THE COURT (interposing): Just a minute, madam. You will have a question put to you.

THE WITNESS: All right.

BY MR. MURRAY:

Q What is the women's division?
 THE COURT: Just a minute, Mr. Murray; suppose you gentlemen come to the bench.

(Thereupon counsel approached the Court's bench, the witness retired from the witness stand and, out of the hearing of the jury, the following occurred:)

THE COURT: I cut her off because I don't know where we are going. I don't want to get into a lot of extraneous matters which we have very religiously endeavored to stay away from, and I don't know what her answer would be.

MR. ROGGE: I know, Judge, and I am going into it. I think a further explanation of her function will show why she didn't know. Her job was to raise money.

THE COURT: That is what she said.

MR. ROGGE: I knew she said something that indicated to the Court that she wasn't.

THE COURT: All right, if you want to open it up, you will open it up for all sides, not this particular part of the picture. That is why I cut her off when I did, 316 and that is why I cut off Mr. Murray. I am not going to cut you off now if you want to do that.

MR. ROGGE: I don't want to do it any more than you, but on cross examination I want to ask a few questions, and I do not intend to open it up.

THE COURT: I am going to put you on notice if you do I will open it up for all purposes.

MR. MURRAY: She answered the question as to her title, which was like Miss Bryan, if you can clear that up.

MR. ROGGE: I am not objecting to the question.

MR. MURRAY: I am not particularly interested.

MR. ROGGE: If you leave it there I will ask the question.

THE COURT: I want you to understand, Mr. Rogge.

MR. ROGGE: If that is all then I don't see the reason for it.

THE COURT: All right.

(Thereupon counsel returned to the trial table, the witness resumed the witness stand and, in the hearing of the jury, the following occurred:)

BY MR. MURRAY:

Q Mrs. Pollock, you used the expression "executive director," did you not? A Executive secretary.

THE COURT: Executive secretary.

317 **BY MR. MURRAY:**

Q Executive secretary of what? A Of the women's division.

Q There is an executive secretary of the whole organization? A Yes.

Q You are the executive secretary of one division? A Yes.

Q Are there any other officers that have the title of executive secretary? A I don't think so.

MR. MURRAY: That concludes the direct examination, if the Court please.

Cross Examination

BY MR. ROGGE:

Q Mrs. Pollock, will you tell us just what your duties consist of? We have two executive secretaries, now, one of them is executive secretary of the organization, and the other is executive secretary of the women's division.

Would you tell us just what your duties were? A My duties were to work with a group of women, and to meet with them regularly, and others I knew through the fund

raising activities for the organization, and help them carry out those fund raising activities.

Q Did you have anything to do with anything
318 else? A No.

Q Now, you had an explanation you wanted to give a moment ago. Was that as a further answer to some of your questions? A Yes.

Q Will you tell us what it is? A I wanted to explain to the Court that the reason I knew who some board members were and I didn't know about others was that some of them were members of the women's division and I worked with them regularly, and others I knew through the fund raising activities which were carried on, because some of the fund raising activities were carried on with their help.

Q And that accounts for the fact that there were some people you knew were board members, and as to others you had to say you didn't know? A That is correct.

Q Although you have attended—

THE COURT: I don't think you need argue, Mr. Rogge. Suppose you ask the question.

BY MR. ROGGE:

Q As to the meetings you attended, the people who were gathered together you didn't know whether they were board members, or not? A That's right.

319 Q And the meetings you attended related to fund raising? A Mr. Murray showed me minutes of a meeting which I attended that evidently did not relate only to fund raising.

Q But do you have a recollection of a discussion that related to anything else, Mrs. Pollock, than fund raising, after refreshing your recollection?

THE COURT: From refreshing your memory, if you have.

THE WITNESS: I must have attended meetings because my name is there.

BY MR. ROGGE:

Q I know, but I am asking do you have a personal recollection of any of these meetings you attended? Do you

have a personal recollection of participating in any discussion other than those relating to fund raising? A No.

Q Now, at these meetings you did attend, would you stay throughout the meetings? A I don't even remember that.

Q Well, do you know whether you came in at a particular point, or left any particular point? A I think that I came in before the meeting started, but I do not remember leaving before the conclusion, but I can be sure.

Q Well, did you ever at any time at meetings 320 that you attended, do you have a recollection of anybody ever making a motion to adjourn, and things like that? A Yes, I think so.

MR. ROGGE: That is all.

MR. MURRAY: I have no further questions.

THE COURT: All right, madam, you may step down. (Witness excused.)

MR. MURRAY: Mrs. Mohler.

Thereupon—

Mrs. Blanche Mohler

was called as a witness by the United States, and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q Are you Mrs. Blanche Mohler? A Yes, I am.

THE COURT: Keep your voice up, please, so that the gentlemen of the jury can hear, and counsel, please.

BY MR. MURRAY:

Q What is your first name? A Blanche.

Q B-l-a-n-c-h-e? A Yes.

Q Mohler? A Right.

321 Q What is your address? A 15 Central Park West, New York.

Q Can you talk into that instrument? A I will be glad to.

Q What is your occupation, Mrs. Mohler? A I am an accountant and executive in the direct mail and advertising field.

Q Have you ever been connected in any way with the Joint Anti-Fascist Refugee Committee? A No, I don't think so, not officially.

Q Not officially? A No.

Q Have you attended meetings of that organization's executive board? A I have attended meetings as public relations consultant. I don't know whether there had been board meetings or financial meetings.

Q What was your capacity in attending those meetings? In what capacity did you appear? A Prior to my present job I have been all my life a fund raising public relations director in the field of money raising, social work, so that it was logical that I was consulted by this organization in their financial campaign, as I was in many other organizations.

Q Did you attend at meetings as a consultant? 322 A Yes.

Q Did you know Mrs. Pollock, the head of the executive board of the women's division of that organization? A Yes.

Q Did you know the members of the executive board of the organization? A I knew the members of the organization who were acting in the fund raising activities, and so forth about which I was consulted. I wouldn't know who were members of the board and who were not.

Q Did you attend meetings at which action was taken by the board in connection with affairs of the organization? A Action to raise funds, I would say.

Q Did you attend a meeting of the board of that organization at which a decision was made in reference to producing records before the Congressional Committee in Washington? A I wouldn't remember that because I attended so many meetings.

Q I will ask you in particular if you attended a meet-

ing in February, 1946, at which the board unanimously voted to instruct, and did instruct, Dr. Barsky not to produce records of the organization before the Committee on Un-American Activities?

323 MR. ROGGE: I object to that as calling for material not in the record. There just is no testimony which substantiates what counsel assumes in his question and, therefore, I object to it.

BY THE COURT:

Q Have you any recollection of attending any other meetings other than fund raising? A I wouldn't know. I may have attended such meeting and left before that part of the business was discussed.

Q Relating specifically to February 11, 1946, do you remember any meeting then? A I certainly wouldn't remember the date.

Q You wouldn't? A No.

Q Do you remember any meeting at which the presenting, or failure to present the records before the committee was discussed? A I don't think so.

THE COURT: All right.

BY MR. MURRAY:

Q Mrs. Mohler, I show you a document which I will ask you to read to yourself for the purpose of refreshing your recollection (handing paper writing to witness).

THE COURT: I think she has read it, Mr. Murray.

MR. MURRAY: I am sorry.

BY MR. MURRAY:

324 Q Does that refresh your recollection in such a way that you have any different answer to make?

A Not particularly, sir, because I do not believe at any board meetings I was present at—the question of financial campaigns came up from time to time.

Q In other words, the document I show you does not cause you to add anything to what you have said heretofore? A No.

Q Do you know—were you about to say something? A No.

Q Do you know Mrs. Fleischman? A Yes.

Q How long have you known Mrs. Fleischman? A I would say over many years.

Q Was she ever present at a meeting of this board, or other persons connected with this organization, at which you were present?

MR. ROGGE: I object to that question. She hasn't stated she was ever present at a meeting.

THE COURT: I think you should reframe the question, Mr. Murray.

BY MR. MURRAY:

Q Was Mrs. Fleischman ever present at any meetings of this organization, any officer, any person connected with it that you yourself attended? A I wouldn't remember that. I have seen Mrs. Fleischman at dinners and events for many, many years—

325 Q (Interposing) Of course, speaking about funds in their own—

MR. ROGGE: Just a minute, the witness hasn't finished.

THE WITNESS: My only interest in connection with this was incident to raising funds. I wouldn't remember any meetings at which it was presented.

BY MR. MURRAY:

Q Do you remember any meeting, is the question? A I don't know, there were so many.

Q Is it your answer that you do not remember specifically that Mrs. Fleischman was ever present at any meeting of the organization, or any officer or persons connected with it? A I can honestly say I do not know whether she was present at any meeting I attended.

BY THE COURT:

Q I didn't understand. Do I understand you to say that you do not remember honestly whether she was? A That is correct, I don't remember whether she was.

MR. MURRAY: That concludes the direct examination.

Cross Examination

BY MR. ROGGE:

Q At what period of time, Mrs. Mohler, were you
 326 giving advice to the Joint Anti-Fascist Refugee
 Committee as to fund raising? A Probably since
 its inception.

Q And you gave advice in 1946 and '45? A Yes.

Q You mean you also gave advice to other organizations? A Yes, I am from the field of social workers, Mr. Rogge, and I have been adviser to many child welfare organizations—

THE COURT: We are not interested in this, Mr. Rogge, as you know.

BY MR. ROGGE:

Q How many all told? A I would say in my fund raising career probably 75 such fund raising organizations.

MR. ROGGE: That is all.

MR. MURRAY: That is all.

THE COURT: You may step down.

(Witness excused.)

MR. MURRAY: Mr. Kushman.

Thereupon—

Felix Kushman

was called as a witness by the United States, and, being first duly sworn, was examined and testified as follows:

327

Direct Examination

BY MR. MURRAY:

Q Your name is pronounced Kushman? A Kushman.

Q How do you spell it? A K-u-s-h-m-a-n.

Q Your first name, sir, is Felix? A Yes.

Q What is your home address? A 150 Bennett, New York City.

Q Do you mind repeating the street?

THE COURT: 150 Bennett.

THE WITNESS: Bennett.

BY MR. MURRAY:

Q What is your occupation, sir, at this time? A Fund raiser.

Q Have you ever had any connection with the Joint Anti-Fascist Refugee Committee? A I have.

Q And what sort of connection with them? A I have worked with them.

Q When did you work with them? A Since 1940 until 1946.

Q And in what part of 1946 did you stop work for them? A I worked for them in 1946.

328 THE COURT: When did you stop?

BY MR. MURRAY:

Q When did you stop there. When did you terminate your association with the organization? A The exact date I can't remember.

Q Can't you give us some idea? A The end of '46, I think.

Q Toward the end of '46? A That's right.

Q Are you quite sure you were connected with them as late as April, 1946? A I am sure, yes.

Q Now, at that time did you have a separate office of your own as fund raiser? A That's right.

Q What was the name on that office? A The same office, a separate office in the building.

Q You didn't have an office with your name on it? A No.

Q You were employed then as a consultant by this committee, is that right? A That's right, to help raise funds.

Q Did you attend meetings of the executive board of that organization? A Once in a while, yes.

329 Q Who were the members of that organization in '46, the executive board, if you know?

MR. ROGGE: I object. It is repetitious, Judge. We have had it a number of times.

THE COURT: I think if he knows he may state.

THE WITNESS: I know some. I may not remember some others.

BY MR. MURRAY:

Q I will ask you if Mrs. Fleischman, to your knowledge, was a member? A I saw her there. I don't know exactly if she was a member, or not, because I saw other people attend board meetings.

THE COURT: Just a minute. Did you hear the question? Maybe I didn't understand.

MR. MURRAY: I think he was trying to answer that he didn't know who were board members, but some were not.

THE COURT: Suppose you put the question again.

BY MR. MURRAY:

Q I was asking you whether Mrs. Fleischman was a board member. A I don't know that if she was an official board member, or not. I saw her in board meetings once in a while.

Q Now, do you remember any meeting of that body, that executive board, or whatever it was, at which 330 the question was discussed of producing, or not producing, records of that organization before the Committee on Un-American Activities in Washington? A I heard about it.

MR. ROGGE: We object to it, as to this whole line of questioning as to relevancy. I know Your Honor has ruled on it but, for the sake of the record, I repeat it.

THE COURT: Yes.

BY MR. MURRAY:

Q You say you heard about it, and at which meetings were you present at which you heard that discussion?

A If I remember—

BY THE COURT:

Q No, do you understand the question? A Yes.

Q The question is did you attend any board meeting when the matter of records was discussed? A From time

to time I attended board meetings when it was discussed, but never as to records, but the discussion only.

BY MR. MURRAY:

Q What was the meeting you attended? A The discussion of the subpoena of the Un-American Activities Committee?

Q Was Mrs. Fleischman present at that meeting, 331 do you recollect? A I don't recall, it has been so long ago.

Q Do you remember what action was taken by that board at that meeting? A No, because I left before—No, I don't.

Q You were about to say that you left before the final action, is that right? A Yes, because it isn't my business to discuss these things.

Q Did you know Mrs. Mohler, Blanche Mohler? A I have met her; yes.

Q Mrs. Pollock, Mrs. Mabel Pollock? A Yes.

MR. MURRAY: That closes the direct examination, if the Court please.

MR. ROGGE: No questions.

THE COURT: Very well. Is this witness excused, gentlemen?

MR. ROGGE: That is agreeable.

THE COURT: All right, you are excused.

(Witness excused.)

MR. MURRAY: Shall I continue?

THE COURT: It is 12:30. I think probably it is a good place for recess.

Gentlemen of the jury, and alternate juror, we will 332 now recess until 1:45 with the same admonition here-
tofore given you, namely, that you speak to no one with reference to this case, and permit no one to speak to you with reference to this case, nor are you to talk among yourselves with reference to this case, and likewise you are to ignore if perchance anything appears in the newspaper or on the radio about it.

(Thereupon at 12:30 o'clock p. m. Court was recessed and further proceedings herein continued until 1:45 o'clock p. m., Monday, April 5, 1948.)

Afternoon Session

(Pursuant to recess heretofore taken, Court was reconvened at 1:45 o'clock p. m., Monday, April 5, 1948, and the following occurred:)

THE COURT: Are you ready to proceed?

MR. MURRAY: Yes. Will you call Miss Bryan, please?

Thereupon—

Miss Helen Bryan,

was called as a witness by the United States, and, being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MURRAY:

Q Your full name is what? A Helen R. Bryan.

333 Q What is your home address, Miss Bryan? A 58 Bank Street, New York City.

Q Do you appear in response to the subpoena I now show you, which is addressed to the Joint Anti-Fascist Refugee Committee?

THE WITNESS: Your Honor, I claim the privilege against testifying.

MR. MURRAY: If the Court please, I do not believe the witness is in position to claim privilege. I am prepared to argue it.

MR. ROGGE: I am prepared to argue it, too, Your Honor.

THE COURT: Gentlemen of the jury, the Court will excuse you briefly as the Court considers this matter which is a legal proposition, and that does not concern you. Please remember the admonition heretofore given you.

(Thereupon the jury retired from the courtroom and the following occurred:)

MR. MURRAY: To clear the record, Your Honor, may I ask the clerk to mark that subpoena?

THE COURT: Yes.

THE DEPUTY CLERK OF THE COURT: What is the next number 12?

MR. MURRAY: It would be 12.

(The subpoena referred to by counsel was marked Government Exhibit No. 12 for identification.)

MR. MURRAY: The subpoena which I have just shown Miss Bryan has now been marked Government's Exhibit No. 12.

334 If the Court please, this subpoena is directed to the Joint Anti-Fascist Refugee Committee, 192 Lexington Avenue, New York City, and calls for the production of numerous records under four items. It is the subpoena which was the subject of argument this morning before Your Honor. The subpoena was not directed to any individual, but was directed to the organization by the name and the present witness, Miss Helen Bryan, I assume appears in response to it.

I say that the records called for are not personal records, and she may assert no personal privilege in regard to them, and, therefore, her claim is not well founded.

MR. ROGGE: While I am at it, Judge, I might as well cover the field right here on her claim against self-incrimination. Now, I say the question which was asked her, whether she was here under subpoena to the Joint Anti-Fascist Refugee Committee, and an answer to that question will automatically mean that she is in some capacity to that committee or she would not be responding to this subpoena. I might say to Your Honor from a factual standpoint we have a half a carload of books and records which are in front of Your Honor, which are here in the courtroom, and the most convenient place to put them. The records subpoenaed are here but I do not think Miss Bryan can be called on to testify because she is under indictment and, as a matter of fact, her case immediately follows this

335 one, and the question counsel has put would be to indicate that she is in some way connected with the Joint Anti-Fascist Refugee Committee, otherwise she would not be responding to that subpoena.

• • •

338 THE COURT: Let me ask you this; suppose the question now to be put to the witness were the same questions which were put to her heretofore and to which she responded, what would be the rule there?

339 MR. ROGGE: We have a memorandum on that, too, Judge. That has been prepared, Your Honor. You ask me a pertinent question, that is, in the previous trial Miss Bryan was asked a question that if in this question she was asked a question about certain books and records she is being questioned about today, and you are asking me whether that is a waiver of her claim of privilege, and I say it isn't. Your Honor didn't get this memorandum?

THE COURT: I did get one, sir.

MR. ROGGE: I don't think Your Honor got this one because I didn't see the signature.

I think she can claim her privilege, and hasn't waived it, and the first case I would call attention to is Burdy vs. Conroy, 48 N. Y. Supp. 2nd, 871, decided in 1944:

In this case the wife of a man charged with the illegal possession of a gun testified against him in Felony Court without claiming her privilege and thereafter, when the husband was held for grand jury action, she asserted her privilege at his trial in County Court and refused to repeat the testimony on the grounds that the testimony might tend to degrade or incriminate her. The Court there held that she could still claim her privilege, stating, "Because petitioner had once, namely, in the Criminal Court, given the degrading or incriminating testimony was no bar to her asserting her claim of privilege when directed to repeat it at the trial of her husband in the County Court."

340 In the case of People vs. Cassidy, 213 N. Y., 388, decided in 1915—

THE COURT: Is that New York Supplement?

MR. ROGGE: New York Court of Appeals, the highest court. In that case the court held that a waiver of the privilege in the first proceeding cannot extend to new and independent proceedings where the circumstances, surroundings and respective criminal charges are different, and the Court there stated, citing numerous cases, first quoting from Wigmore on Evidence, and this is a quotation in the case from Section 2276 in Wigmore:

"The waiver involved in the accused taking the stand is limited to the particular proceeding in which he thus volunteers testimony. His voluntary testimony before a coroner's inquest or a grand jury or other preliminary and separate proceedings is therefore not a waiver for the main trial; nor is his testimony at a first trial a waiver for a later trial."

Then the court goes on:

"The weight of authority is against the claim of the people that Walter by giving testimony before Justice Scudder waived his constitutional right to decline to give testimony on the trial of Willett that could be used against him in a criminal case," citing I should say some ten or twelve cases.

I should also like to call Your Honor's attention to 341 a Federal case, United States vs. Weismann; the facts are not as strong as in the cases I have cited. In the cases I have cited you they are precisely this case. This is in 111 Fed. (2) 260, decided by Judge Learned Hand, in which the court pointed out that where a witness before a grand jury had been instructed by his attorney to claim his privilege, and he went ahead and answered the question and then immediately asked to retract his answers and thereupon asserted his privilege, the Judge held that he did not abandon the right to claim a privilege where it was apparent that the answers were slips and not intended as an abandonment.

Now, as I recall, Miss Bryan at the last trial, this was right at the close of the trial, I think I was a little surprised at the subpoena—I had never undertaken to have anyone serve as a witness who had been on trial. This is true it was served on the Joint Anti-Fascist Refugee Committee, but she was the secretary who would be the one normally to respond, and she did respond, and she brought some books and records, and I think there was one additional question asked, and I can say to Your Honor that it had been my understanding from earlier in the day that Miss Bryan wanted to claim the privilege.

• • •

367 **THE COURT:** I understand those documents which you have just shown to counsel and the Court, if Miss Bryan were recalled, her recall would be for the sole purpose of identification of those documents?

MR. MURRAY: That is exactly correct.

THE COURT: All right, I will permit that. I am speaking of papers which have been marked for identification Government Exhibits 7, 8, 9, and 10, and those are the documents which were previously introduced in this case through her.

MR. MURRAY: Yes, through Miss Bryan last June in the trial of the other defendants, yes, sir.

THE COURT: Are you ready to call the jury now?

MR. MURRAY: Yes, sir.

THE COURT: Recall the jury.

(Thereupon the jury was recalled into the courtroom, and the following occurred:)

MR. MURRAY: Call Miss Bryan, please.

Thereupon—

Miss Helen Bryan

a witness heretofore sworn for the Government, being recalled, was further examined and testified as follows:

*Direct Examination (Continued)***BY MR. MURRAY:**

368 Q Miss Bryan, before I ask this question I am going to show you some documents which I will ask you to glance through sufficiently to be able to say whether you identify them.

I am showing you first Government's Exhibit 7—

THE WITNESS (interposing): Your Honor—

THE COURT: The Court has ruled that you may do that.

THE WITNESS: Oh.

BY MR. MURRAY:

Q I shall now show you Government's Exhibit 8. Have you finished looking at that? A Yes.

Q Now, I am showing you 8—taking 7 from the witness—have ~~you~~ finished looking at 8? A Yes, sir.

Q I am now showing you Government Exhibit 9.

I now show you Government Exhibit No. 10.

Miss Bryan, you have now looked at Government Exhibits 7, 8, 9, and 10, and I will ask you this question: Are those records of the Joint Anti-Fascist Refugee Committee? A The list of the board members is.

Q You are referring to that Government Exhibit 8? A Yes.

Q What about 7, 9, and 10? Are they records of the Joint Anti-Fascist Refugee Committee?

369 THE COURT: By records do you mean copies of them, sir?

MR. MURRAY: Yes, they are photostatic copies.

THE WITNESS: Oh, they are photostatic copies?

BY MR. MURRAY:

Q Yes. A You see, I would not be able to say whether they are absolutely correct word for word. I would have no way of proving that because my memory couldn't prove that.

Q Are you able to say whether those exhibits 7, 9, and 10, are, or are not, photostatic copies of records of the

Joint Anti-Fascist Refugee Committee? A No, I couldn't say that. I couldn't say that they were photostatic copies.

Q Is it because they are photostatic copies? A No, but I couldn't say that they were photostatic copies unless I knew they were photostatic copies.

Q What I meant to say was if you saw the originals would that satisfy your doubts? A Well, I suppose they would have to be compared. I couldn't from memory say that those were word for word those records.

Q If you saw the original records could you identify them? A Yes, sir.

370 Q As to this one, you identify 8? A Yes, sir.

MR. MURRAY: I offer exhibit 8 in evidence at this time.

THE COURT: It will be received.

(Thereupon document identified by witness as list of board members was by the Court received in evidence as Government Exhibit No. 8.)

MR. MURRAY: May I read this to the jury at this time, if the Court please?

THE COURT: Yes.

MR. MURRAY: Members of the jury, I shall read now Government Exhibit No. 8:

Members of the executive board of the Joint Anti-Fascist Refugee Committee:

Dr. Edward K. Barsky, Dr. Jacob Auslander, Lyman R. Bradley, Marjorie Chodorov, Howard Fast, Mrs. Ernestina Fleischman, Mrs. Ruth Leider, Mr. Gleason, Harry Justiz, Mrs. Louis Kamsky, Mr. James Lustig, Mr. Manuel Magana, Mrs. John T. McManus, Dr. Louis Miller, Mr. Herman Shumlin, Mrs. Charlotte Stern, Mr. Jesse Tolmac and Mrs. Bobbie Weinstein.

THE COURT: Will you gentlemen come to the bench a minute?

(Thereupon counsel approached the Court's bench, the witness retired from the witness stand and, out of 371 the hearing of the jury, the following occurred:)

THE COURT: I was going to ask Mr. Rogge if he wanted to insist on the other records being brought from the Court of Appeals.

MR. ROGGE: Let me confer with my associates a minute?

THE COURT: No, I am asking you if you feel you ought to preserve your point.

MR. ROGGE: What Your Honor is asking me is if the records are brought over if we will admit that they are—let me confer with my associates.

THE COURT: As to just what the fact is.

MR. ROGGE: I think I am agreeable to this stipulation, preserving my point that Your Honor erroneously overruled her claim of privilege, that if the originals were brought over, 36, what are they, A, B, C?

MR. MURRAY: I wouldn't attempt to say—

MR. ROGGE: That if the originals of what are now 7, 9, and 10 were brought over that she could identify them in the same way in which she identified them in the other trial.

MR. MURRAY: All right.

THE COURT: Your proposition was just a question of time?

MR. MURRAY: In fact, it might delay her, it might be necessary to keep her overnight.

THE COURT: I don't see any sense in that.

372 MR. MURRAY: I offer in evidence, in view of the ruling of Your Honor, exhibits 7, 9, and 10.

MR. ROGGE: I wish to object on the ground of relevance for one thing, if the Court please. As I recall one thing—I am perfectly willing to state these out of the presence of the jury if you prefer; the one of February 11 affirmatively shows that Mrs. Fleischman was neither present nor reached by telephone, and I do not see what bearing it has in her case, and as far as the meeting of December 14th is concerned, it doesn't show who was present,

but in any event in response to a subpoena that was never carried out, and I do not see any relevance or materiality in this proceeding.

THE COURT: They will be received.

(Thereupon the documents referred to, namely, the constitution of the Joint Anti-Fascist Refugee Committee was received in evidence as Government Exhibit No. 7.)

(Document entitled Members of the Executive Board of the Joint Anti-Fascist Refugee Committee was by the Court received in evidence as Government Exhibit No. 8.)

(Document identified as minutes of meeting of December 14, 1945, was by the Court received in evidence as Government Exhibit No. 9.)

(Document identified as minutes of meeting of February 11, 1946; was by the Court received in evidence as Government Exhibit No. 10.)

373 MR. MURRAY: With the permission of the Court I shall simply state to the jury that 7 is the constitution of the Joint Anti-Fascist Refugee Committee. I shall not read it. It will be available, of course, for either side to read.

I shall now read Government Exhibit No. 9:

“Motion adopted by the National Executive Board of the Joint Anti-Fascist Refugee Committee at its meeting on December 14th, 1945, at 192 Lexington Avenue, New York City.

“The National Executive Board of the Joint Anti-Fascist Refugee Committee at its meeting on December 14th, 1945, discussed the Summons from the House Committee on Un-American Activities to Helen R. Bryan or Dr. Edward K. Barsky to appear before this Committee on December 19th, 1945, at 10:00 a. m. at their chambers in Washington, D. C. and to ‘produce at said hearing all books, records, papers and documents showing all receipts and disbursements of money by the said Committee or on its behalf, and all letters, memoranda or communications

from, or with, any person or persons outside of the United States.'

"After consideration and discussion of

"(1) The fact that the House Committee on Un-American Activities is charged to investigate:

374 "(a) The extent, character and objects of un-American propaganda activities in the United States.

"(b) The diffusion within the United States of Subversive and un-American propaganda that is instigated from foreign countries, or of a domestic origin"—

May I interrupt to suggest to Your Honor in view of certain rulings, that I could omit some of this?

THE COURT: I think you can. I think, Mr. Rogge, you understand that.

MR. ROGGE: Yes.

MR. MURRAY: This is under (1), (a), (b), and (c); and (2), another reason, and then it goes on as follows:

"Therefore, the Executive Board of the Joint Anti-Fascist Refugee Committee unanimously moved that

"(1) The demands of the House Committee on Un-American Activities are unwarranted, unjustified, and an infringement upon the democratic rights guaranteed by our Constitution.

"(2) And instructed its National Chairman and National Executive Secretary to

"(a) Advise with competent lawyers.

"(b) Inform the sponsors of the Spanish Refugee Appeal of the Joint Anti-Fascist Refugee Committee and inform the Chairman and Executive Secretaries of the Chapters of this action of the House Committee on Un-American Activities.

375 "(c) Take any additional steps necessary and pursue all means to maintain and protect the rights of this Committee and its supporters from the unjustified attack on the Joint Anti-Fascist Refugee Committee by the

Committee on Un-American Activities which we consider constitutes a threat to democratic procedure in the United States."

The next is number 10, which I shall now read as follows:

"Minutes of the National Executive Board meeting of the Joint Anti-Fascist Refugee Committee.

"February 11th, 1946, at 192 Lexington Avenue.

"Dr. Edward K. Barsky, National Chairman, presiding.

"Present: Dr. Edward K. Barsky, Dr. Jacob Auslander, Mrs. Ruth Leider, Miss Austin (NMU), Prof. Lyman R. Bradley, Manuel Magana, Mrs. Mabel Pollock, Mrs. Blanche Mahler, Sol Lasser, Felix Kusman, and Helen R. Bryan.

"Dr. Barsky opened the meeting and presented the following agenda:

"1. Committee on Un-American Activities.

"2. Opening of account in the National City Bank of New York.

"Motion: That the proposed agenda be accepted.

"Carried.

376 "Motion: To accept the minutes of the last meeting.

"Carried.

"Committee on Un-American Activities: Dr. Barsky reported that he would appear in Washington on February 13th before the Wood-Rankin Committee as requested in the subpoena served on him on January 28th.

"After discussion regarding the procedure which the Executive Board of the Joint Anti-Fascist Committee should direct Dr. Barsky to follow on February 13th, the following motion was made and seconded:

"In view of the fact that the sole purpose of the Joint Anti-Fascist Refugee Committee is to alleviate the sufferings of the Spanish Republicans in exile and the International Volunteers, which purpose is truly American in every sense of the word and can, by no stretch of the

imagination, be considered un-American, subversive, or an attack upon the principles of our form of government; and "In view of the fact that we have never deviated from this sole purpose"—

"The Executive Board of the Joint Anti-Fascist Refugee Committee, instructs its National Chairman, not to produce"—

377 And then, without reading it, I will say are quoted the terms of the subpoena which had been served upon Dr. Barsky to produce records, and under that, quoting the resolution is:

"Carried Unanimously.

"Voted in Absentia: Mrs. Marjorie Chodorov, Howard Fast, Leverett Gleason, Harry M. Justiz, Mrs. Samuel Kamsky, Mrs. Charlotte Stern and Dr. Jesse Tolmach.

"Account in the National City Bank of New York.

"Helen R. Bryan asked authorization from the National Executive Board to set up a special account in the National City Bank whose purpose is to isolate funds for deportation back to European countries of Spanish Republicans in exile and members of the International Volunteers. Checks will be signed by Helen R. Bryan and Prof. Lyman R. Bradley.

"Carried Unanimously.

"Motion to Adjourn.

"Respectfully submitted, Helen R. Bryan, Executive Secretary."

That concludes the direct examination, if the Court please.

MR. ROGGE: No cross examination.

THE COURT: Do I understand this witness is now excused, not needed further?

MR. MURRAY: That is correct.

378 THE COURT: You are through with the witness, you gentlemen are finally through with the witness?

Then you are excused, Miss Bryan.

(Witness excused.)

MR. ROGGE: I understand that Mr. Murray will find out whether he wishes to use these witnesses.

MR. MURRAY: And, of course, I will excuse them if I am not. I might say to counsel that my present plan is to rest very quickly tomorrow.

THE COURT: I want to say this to you gentlemen, take note of what I say to the jury; I would say primarily tomorrow we will not meet in this courtroom but meet in Judge Curran's room, which is the courtroom on the Fifth Street side of the Court Building, the reason being that he is going to select the incoming jury in my stead, and he will need the larger courtroom, so there will be no mystery about that.

Gentlemen of the jury, you are now excused to return tomorrow morning at 10 o'clock with the same admonition, and I will repeat it, namely, you are to talk to no one about this case, nor permit anyone to talk to you about this case, nor at this time to talk among yourselves about this case, and you are to ignore, if there is anything in the newspaper or on the radio pertaining to the case, and you will report tomorrow at 10 o'clock in Judge Curran's Court.

380 MR. MURRAY: Your Honor, I find out since adjournment yesterday I forgot to state to the jury a stipulation which I think would be necessary in order to make clear what happened.

THE COURT: Very well.

MR. MURRAY: Yesterday, members of the jury, you will recall that Miss Bryan was called as a witness, in the other courtroom, and asked to look at four different papers, and she looked at them and was asked if they were Joint Anti-Fascist Refugee Committee papers and she said one of them was, and then there was a conference at the bench at which I was authorized to state an understanding to you which I neglected to state, and I will state it now.

This is the understanding agreed to by and between counsel for the defendant and myself, of course with the approval of the Court, that if the originals of these papers had been brought over from the Court of Appeals where they are, these being certified copies, and had been shown to Miss Bryan she would have identified all four of these documents as records of the Joint Anti-Fascist Refugee Committee and, in view of that stipulation it was not necessary for us to ask her that question and she was excused, so that the records which were read to you

381 yesterday were in evidence as though they had already been identified by her, and if I may, for the record, repeat:

Government's Exhibit 7 is the constitution of the organization, which I did not read;

Government's Exhibit 8 is a list of the members of the executive board;

Government's Exhibit 9 is a resolution of the organization dated December 14, 1945; and

Government's Exhibit 10 is a resolution dated February 11, 1946.

Thank you.

The Government rests, if the Court please.

MR. ROGGE: We wish to be heard on a motion for acquittal.

THE COURT: All right, sir. Do you desire the jury to be excused?

MR. ROGGE: Yes.

THE COURT: All right, gentlemen of the jury, the Court will excuse you for the purpose of hearing a legal matter at this time with which you are not concerned, with the same admonition heretofore given to you.

(Thereupon the jury retired from the courtroom and the following occurred:)

MR. ROGGE: May it please the Court, I shall make this motion for an acquittal without arguing the points that were previously made on motion to dismiss, and

382 since we have thoroughly considered the others I shall not argue them.

I shall proceed to new points, and I think the one I really want to urge most of all is a thorough consideration of aiding and abetting; something which arose at the last trial after both sides had rested, as I recall—it is not mentioned in the indictment—and I feel at that time I really did not get a chance to clear up that matter in my own mind. I have since, and I do not think there is the slightest basis for this case going to the jury.

Now, the Indictment, the one that we have left, is the second count and that, as Your Honor knows, alleges that before the date of April 4, 1946, that each of them were summoned to produce before the Congressional Committee on April 4, 1946, certain records, and that in response to the subpoenas each and all of them appeared but failed to produce those records.

Now, Your Honor, in the charge in the previous case, in outlining the elements of the offense stated this, that the Chairman of the Committee on Un-American Activities—

THE COURT: Excuse me, I started coughing and didn't hear you.

MR. ROGGE: I was referring to Your Honor's charge.

THE COURT: Yes.

MR. ROGGE: That they caused to be prepared a subpoena and, incidentally, in stating the points on the 383 motion to dismiss I also made the point raised during the trial as well as the point that the document was not a subpoena, and that it should not have been introduced here because of Section 34, Title 38, and continuing with Your Honor's charge, that such a subpoena was served by the chairman of the committee and, so served, that the defendants, alone or in concert with one or more of the defendants, had custody and domination and control over such records; that the defendant, acting with all or in concert with one or more of the defendants, and with knowledge that he had been served with such sub-

poena, wilfully made default, that is, wilfully failed to produce the records called for by the subpoena.

Now, contrary to that, as I get it from the cases, and the case I wish to cite on that, and this is one that is not in the memorandum submitted to Your Honor, I am going to come to that on aiding and abetting; the additional case on concert of action that I wish to call to Your Honor's attention is United States vs. V. M. Piowaty & Sons, 251 Fed. 375, wherein the Court states:

"In my opinion, unlawful agreement is the essence of the offense of combination or conspiracy under the Sherman Act. It is what separates what is permitted from what is forbidden. To hold it illegal for persons in the same business and same trade organization, after exchanging information and views, to act in the same 384 way, but independently of each other, on buying, selling, or prices, would extend the scope of the Act beyond anything heretofore decided, and beyond its particular meaning, and would cause the greatest confusion and uncertainty.

"The necessary agreement or understanding may, of course, be tacit, as well as expressed; its existence may be inferred—and, even in criminal cases, often is inferred—from the conduct of the parties." Citing cases.

"Concert of action among the members of an organization, in particulars such as are set forth in this indictment, strongly suggests agreement; but, if that is the construction which the prosecution places upon the defendants' conduct, it ought to be so stated.

"The Government's contention that the indictment alleges and agreement to which the defendants were parties is based principally on the word 'concerted.' It is a word which unquestionably is often used in a sense implying agreement. But it is also used to describe some action by different persons with the same object in view, not proceeding from agreement between them. An unorganized mob may be said to make a 'concerted' attack. If the in-

385 dictment as a whole were obviously based on the assumption of an agreement to which the defendants were parties, it might be that the language used would be sufficient; but that is not the case. There is no allegation or direct suggestion that the defendants acted under agreement with each other. The absence of such an averment is apparently not due to inadvertence; it seems to be studiously avoided. The indictment appears to have been drawn on the theory that agreement was not essential. Its language and tenor would suggest that the averment of one can be found by implication—certainly not with clearness and definiteness as the defendants are plainly entitled to upon such an important allegation."

Now, this indictment, of course, says nothing about aiding and abetting. That is something that was brought into the case afterwards, and I say to Your Honor what do we really have in this case now that we cut it down to one particular individual.

Now, certain minutes were introduced, and does Your Honor have those? Mr. Murray referred to them this morning.

MR. MURRAY: There is only one copy. I have them here.

MR. ROGGE: I know what is in them, I think.

MR. MURRAY: Do you want anything particular? Here they all are.

THE COURT: Will you let me interrupt you
386 just one minute?

Proceed.

MR. ROGGE: Now, what do they have in this indictment? You really get down to this last paragraph, in response to these subpoenas each and all of the defendants appeared before the Congressional Committee in the City of Washington, District of Columbia, on April 4, 1946, but failed to produce the records called for in the subpoena. That is all you really have. There is no aiding and abetting alleged. There is no concert of action alleged, and I

submit when you get down to facts it could not have been alleged because it wasn't there.

What do you really have in this case? All you have as to Ernestina Fleischman, it is admitted she didn't have custody, Helen Bryan has always had custody, and I dare-say Ernestina Fleischman doesn't know what those books and records look like. Now, there was introduced at the other trial and again here, the minutes of two meetings, one of them on December 14th, which doesn't show who was present, that is the resolution, that doesn't show who was present at all, and the other one is the meeting of February 11th, which shows certain persons as present, and certain of them as voting by telephone, but again it doesn't include Ernestina Fleischman. As a matter of fact, she

387 was there so little that one of the ladies there, Mrs. Kamsly, when she testified yesterday said she was under the impression that Ernestina Fleischman was a member of the board of directors but she wasn't sure. Another of the witnesses, Mr. Jesse Tolmac, said he inferred she was a member of the board of directors because she also appeared down here in Washington.

Now, there is evidence in one of these exhibits introduced that says that she was one of the members of the executive board. I can't say that she isn't, but I am saying to you, Judge, that she was in this picture so little, that there is nothing you have with reference to her.

I might say that on looking at Wigmore this morning, I am not going to argue this at length because Your Honor has ruled on it, but he has a section here which begins:

"The waiver involved in the accused taking the stand is limited to the particular proceeding in which he thus volunteers testimony."

They then have a case cited here which was as to the same proceeding but in a different count, and so I think Your Honor's ruling on that was erroneous, and then looking at the documents which were submitted, what do you have in this case?

I thought in the last trial, I thought those two pieces of evidence, I wouldn't call them crucial, I was amazed when Miss Bryan didn't claim her privilege relating to that

388 on the stand in the preceding trial; they did constitute evidence as to those people who participated in them, but as to both meetings as to one it was affirmatively shown Mrs. Fleischman wasn't there, and all the testimony as to who was at the other meeting, there was testimony by one witness yesterday that he saw Mrs. Fleischman at a meeting in March, but it was such a meeting there have been no minutes produced with reference to it, so all that took place, according to the testimony, is that a report was made at which no action was taken.

I also asked one of the witnesses, I don't remember which one it was; I may have asked two of them, whether they ever heard Mrs. Fleischman say anything, or whether they ever heard her propose any resolution, and they couldn't remember any such thing.

Now, she did have a statement which Mr. Wolf prepared, he being counsel for all of them; he could give advice to one person and he could have given it to another. She did produce the same statement the others produced; they all consulted the same lawyer, and I submit if they had given one piece of advice to one and another to another, they would have been subject to censure. It was his opinion as the attorney for the board, as it is mine, that the House Committee didn't have jurisdiction—I am not going to argue that question again this morning—but there

389 wasn't anything else he could do but give the same advice. That came from his heart, and that is what

I think he gave, and when you boil the whole thing down what do you have with reference to Ernestina Fleischman? I don't see anything. She is not shown to be present at one, and affirmatively shown to be present at another, and that has been designated an important meeting, but you know it isn't, and they say "aiding and abetting."

I will be frank to say to you, Your Honor, at the other trial, I will be honest with you, I didn't think I had a chance to think it through at the other trial; I did the best I could with it, but it was one thing that sort of came in at the tail end, and I had the feeling then, and have the feeling now, and it is, with all due respect, to Mr. Murray, not in any sense, he will understand that, a pulling of a fraud or shell game on me, or pulling a rabbit out of the hat.

He did say aiding and abetting. Well, take Jacob Auslander, what did he aid and abet, and while he was aiding and abetting, who did he aid, and so we have an aider and abettor to an aider and abettor, and so on ad infinitum.

We have to get down to a solid basis on this aiding and abetting, where it no longer looks like this sort of thing. Aiding and abetting, of course, I think is a secondary principle, but you have to have somebody who is principal and aided in the crime. Who was it in this case?

390 Who did Ernestina Fleischman aid and abet?

Now, then, you have to have a principal who commits a crime, and it is on that that I want to consider some cases with Your Honor, and we submitted a memorandum on these, and one of them is Morgan against the United States, on which certiorari was denied in this case, in the Tenth Circuit—no, it is another one that certiorari was denied in—decided in 1947, and there the court made a ruling which really cleared this thing up in my own mind. The court there held and said:

"The record and brief of the Government are silent as to who the Government contends was the principal whom Morgan was aiding and assisting in the transportation of the liquor."

I have never heard here yet who the principal was beyond Mr. Murray saying they aided and abetted each other, and you have to have a principal who committed the crime. Now, he goes on:

"It may be argued that the circumstantial facts in the case show that he was hauling it for Cobb. The evidence does establish that Cobb was operating a place where liquor was sold, and that the Plymouth car in question was seen around the place at various times and that Cobb drove it. But Morgan and his wife lived in a cabin 391 at the place, and other parties also lived there.

Morgan drove the car, as also did a woman who no doubt was Morgan's wife. No attempt was made to establish ownership of the car, and we do not know whether it belonged to Cobb or to Morgan. The mere fact that Morgan was apprehended with some whisky in a Plymouth car, the ownership of which is unknown, coming toward Lawton, is insufficient to prove that he was taking it to Cobb's place, or that he was hauling it for Cobb rather than for himself.

"To sustain a verdict of guilty based on circumstantial evidence, the circumstances must not only be consistent with guilt but they must be inconsistent with innocence. Measured by this yardstick, the circumstantial evidence is wholly insufficient to establish that Morgan did aid or assist another in the interstate transportation of the liquor in question."

What do you have in this case? This woman comes down in pursuance of a subpoena, along with others. Why? They have all been under subpoena, they would have been in contempt, assuming the committee to be constitutional, if they had not come down. All we have is that Ernestina Fleischman, served with a subpoena, came to Washington, as she was required to do; that other members of the executive board came down, Your Honor, feeling they had to come down, and when she gets before the committee 392 she gives a statement saying, "I don't have custody." That is all she did at that time. That is not a crime. There has to be a crime and, as I called to Your Honor's attention, one cannot commit, or aid and abet in the commission of a crime unless another has committed

the offense. One cannot be an aider and abettor in the committing of an offense, acting for themselves. You have to have someone who was the principal.

Well, Helen Bryan came down on a previous occasion and refused to turn over books as evidence, but there is not the slightest bit of evidence in this record, not one shred, not one scintilla that the defendant knew about it.

Yes, Dr. Barsky came down, but could she have aided and abetted him?

Let's go back, could she have aided and abetted Helen Bryan in that, or Dr. Barsky? There is not the slightest bit of evidence that she ever knew prior to that time that Dr. Barsky was subpoenaed to appear. There is not the slightest bit of evidence that she knew Dr. Barsky had been subpoenaed. How could she have aided and abetted Dr. Barsky?

As far as all these other people down the line are concerned, what is their crime, except Mr. Murray says they are aiders and abettors. How can you have aiders and abettors, and this is the question in Yenkichi Ito vs.

United States, 54 Fed. 2d, 75; this is the Ninth Circuit. Certiorari was denied in 289 U. S., 762. In that case the court held that a person cannot be criminally liable as an aider and abettor unless the act committed by the person aided constitutes a crime.

Now, in that case the Government was trying to establish that defendant was an aider and abettor of someone else who was trying to bring people illegally into the United States. They were apprehended, as I recall, some 40 miles from the mainland, and this is the way the court reasons:

"As the acts of Nohr and Humphrey, which constituted the basis for the substantive charge against the appellant in case No. 2054-H were committed in transporting the aliens from Punta Banda, Mexico, to a point some forty miles off the mainland, where they were intercepted by the United States Coast Guard, they did not make any attempt to bring in or land aliens not lawfully entitled

to enter the United States within the jurisdiction of the United States or of the District Court thereof for the Southern District of California."

We start with that. They neither committed an offense or an attempt to assist this person who is supposed to be behind her activities. That is the difference.

394 "The question is whether the appellant may nevertheless be guilty of an attempt through them, or as

an abettor in the attempt and, if not, whether appellant committed any act within the jurisdiction of the United States sufficient to constitute an attempt within that jurisdiction. In order for one person to be held criminally responsible as an aider and abettor in the commission of an act by another, as it sought to be done here, the act committed by this other person must constitute a crime against the Government which prosecutes the charge." Citing a case.

"Here no illegal act was committed by Nohr and Humphrey within the jurisdiction of the United States. The act committed was legal where committed and was potentially wrong only because coupled with an intent to consummate the act of landing the aliens within the United States. Hence, no substantive offense was committed by Nohr and Humphrey and appellant could not be properly convicted as their aider and abettor or for attempting, through them, to bring aliens into the United States not lawfully entitled to enter.

"It was suggested on the argument that the appellant was guilty of an act within the United States which was of itself an attempt, or, if not, was an act of aiding and abetting the attempt of Nohr and Humphrey. The latter contention is disposed of by what we have already said."

395 And the court also disposes of the other, and we also have a statement along the same line in another case which we have cited to Your Honor, United States vs. Howitt, where the court stated:

"The basic principle of law is recognized that an aider and abettor may not be guilty in aiding or abetting a principal unless the principal did as a matter of fact commit a crime where both the principal and the aider are persons, the hard and fast rule of law is recognized requiring the commission of offense by the principal, without which the aider could not be guilty."

So I say to Your Honor, thinking this thing through, who was the principal whom Ernestina Fleischman aided and abetted? There has to be some person, some principal, who committed the crime. Who was it?

To go back to the first subpoena on Helen Bryan, and incidentally the Government hasn't proceeded on that one at all, but there is not the slightest showing that Ernestina knew about that; or take the subpoena on Dr. Barsky, there is not the slightest evidence that Ernestina knew about that subpoena prior to the time when Dr. Barsky testified. Is the Government going to say that you can have an aider and abettor at some subsequent time as an act after the fact? I never heard of it.

396 What you have to have in this case is some principal committing a crime to whom Ernestina was an aider and abettor. Now, where is it? Thinking this thing through, I say to Your Honor it just isn't there.

Now, let's consider, let's tie up with this question the matter of custody and control. You will recall that we argued before Your Honor that unless these people had custody themselves they complied with a subpoena duces tecum, or whatever the document was, Your Honor ruled it to be a proper subpoena, by coming down and saying, "We don't have custody," and they didn't. But Your Honor went beyond that, and has been sustained; Your Honor ruling on the Wilson case as to domination and control. Now, let's just consider the Wilson case, which is quoted in the opinion of the Court of Appeals. They quote this language from the Supreme Court, this is at page 11. Does Your Honor have that decision?

"A command to the corporation is, in fact, a command to those who are officially responsible for the conduct of its affairs."

Where is there any evidence on that? Where is there any evidence that Ernestina Fleischman had the slightest knowledge that a writ had been served? One of these documents had been served on the Joint Anti-Fascist Refugee Committee to which Helen Bryan is the secretary; where is there the slightest shred of evidence to that effect?

397 The Court says here that if it appears that the writ directed to the corporation presented compliance or failure to take appropriate action within their power for the production of the corporate data they, no less than the corporation itself, are guilty of this disobedience and may be punished for contempt. And the Court goes on:

"We do not have the question whether a subpoena addressed solely to a corporation as such would be valid, and we express no opinion upon that."

Now, there was such a document. It was one of those gotten out on March 28th and, incidentally, Your Honor will recall that subpoenas were served between March 29 and April 3rd for appearance here on April 4th. She got one of those. I don't remember what the date was, I think it was the 29th in her case; she consults with her counsel, as she has every right to do, and comes down here on April 4th and tells the House Committee, "I don't have custody."

THE COURT: I think you might add one sentence to that, Mr. Rogge, because we think the subpoena addressed to members of the governing body are valid under the Wilson case rule.

MR. ROGGE: I will concede that under that decision the Court has held that the subpoenas were valid, but I still come back to who aided and abetted whom?

I think as to the—I am just thinking what conceivable positions Mr. Murray may take on that because he is going to have to show because, although

it is not in the indictment, but we are considering without it being officially in there, who did Ernestina aid and abet, knowing she didn't have custody. The Government is not proceeding on this first subpoena. The House Committee never voted, said nothing, and even if they had there isn't the slightest showing in this record that Ernestina Fleischman had the slightest knowledge of that subpoena.

Well, who else can Mr. Murray say she aided and abetted? Well, he could say Dr. Barsky. Dr. Barsky received a subpoena at the end of January, and appeared on February 17th, I think is the date. There isn't the slightest showing that Ernestina knew anything about that. The only testimony you have in the record is that there was some sort of a meeting. We don't have any minutes for it. There was some sort of a meeting in March at which Ernestina was present and Dr. Barsky made a report.

Now, is Mr. Murray going to take the position that because Ernestina heard a report in March that she was an aider or abettor for something that happened away back in the preceding month, in February? I don't think even he is going to take that position.

So we get down to the—incidentally, that was long before Ernestina got her subpoena, and she got here on March 29th, and I am sure it was a surprise to her, as it was 399 to the other members when she and they got their subpoenas between March 29th and April 3rd. Now, you get down to April 4, and although they have all gotten what the Court of Appeals has ruled to be valid subpoenas, but I still come back to the question that I have been asking ever since, well, I have really been asking it ever since last June, whom did she ever aid and abet?

At that time I mean is it going to be said that Ernestina aided and abetted Auslander? And I ask whom did Jacob Auslander aid and abet? Well, he aided and abetted Professor Bradley.

Whom did Professor Bradley aid and abet? Well, he aided and abetted Marjorie Chodorov, and when you get right down to it I feel I am being subjected to a shell game, now you see it, and now you don't. That is not sufficient under these issues. You have to have some principal who committed some crime, and you can't come in and just say, "Well, everybody aided and abetted everybody else," and you end up with nothing.

It is clear under these authorities, and I am sorry I didn't look at them last June, it is clear under these authorities that you have to have a principal who committed some crime. Now, it is true that had it been set up in the indictment, assuming that a thing of this kind is a crime which, even in spite of the decisions, I can't 400 believe it is, but I can understand how that Government might say as to this February 11th meeting, where they direct Dr. Barsky—I don't think Dr. Barsky had custody and control, but where, as in the February meeting, where according to the minutes they direct Dr. Barsky not to produce them; there was a different understanding concerning them. those who voted over the telephone, it was whether it should be transferred to Dr. Barsky. They were thinking in terms should they empower the person who was going down and give him authority so that he might say, "I have the custody but I won't produce them." They went out of their way not to conceal anything, and even voted on the telephone to say, "We are not going to change custody; Helen Bryan, she is raising the issue, and let's fight it out on that."

Now, I can understand how, if Dr. Barsky's refusal to produce was a crime, and I have difficulty thinking that it is, but then you might have Dr. Barsky as principal and the others who voted at that meeting as aiders and abettors. Even that is stretching it, Judge. That is not alleged in the indictment, but even if you stretch it to that basis you still can't include Ernestina. She was neither present at the meeting nor reached by telephone. The minutes affirma-

tively show that, they are in accord with the facts, she was neither present nor reached by telephone. That is as close as I can get to any solid basis for aiding and 401 abetting, but that lets out this defendant; but even on that basis I say to myself, "I am stretching this as far as I can, I am putting out my foot to try to find some solid ground for the Government theory." Just what can the Government say? Putting myself in the prosecutor's position and I find nothing there, nothing of substance. The most I can find, even in the way of a soft spot is that the Government might say, "Well, Dr. Barsky committed a crime, and since he instructed and voted not to produce, maybe by a stretch of the imagination you can say Dr. Barsky was the principal and the rest were aiders and abettors," but that is not in this case.

As far as the defendant is concerned, we come down to the date of April 4th, and I repeat my question, because I don't see who the principal was. Whom did she aid and abet? We now have evidence that she was a member of the executive board, but she was apparently there so infrequently, that is in evidence, that Mrs. Kamsly had to say she was under the impression that she was a member, and Your Honor struck that statement, as Your Honor had to under the authorities, because impressions are not evidence; and Jesse Tolmac said, "I thought she was a member of the executive board because she was down in Washington with the rest of us," but so was Helen Bryan but

402 Helen Bryan was not a member of the executive board. So which one do you want to call on as your principal whom Ernestina aided and abetted? And I say it is not sufficient to say that she was aiding and abetting the other members who aided and abetted others. You must have some crime, and Ernestina must have knowingly aided and abetted.

Now, Ernestina consulted with counsel. It does not appear what date it was and, incidentally, the testimony that was here did not bring out anything of great impor-

tance. The testimony produced here showed that Weinstein, Shumlin, Gleason, Tolmac, and four or five of those went down there together. Well, maybe they were, but they are not the defendants here, and even so they were certainly entitled to consult their counsel. My associate also points out there was no one, incidentally, who places Ernestina in Mr. Wolf's office. Yes, she had the same statement as some of the others, but she might have gotten—I am overstating the evidence there, really Judge—she might have got it here in Washington; then she might have got it in the office of the attorney for the defendant, or she might have got it from one of the other defendants. All you have, and this is all you have, is that she came down on April 4 when the rest of them came down, and they had to come down because they were subpoenaed to come down, and she was put in the anteroom of the committee room, the Committee on Un-American Activities, because that is where it called for her to be, and that is

403 all you have in this case.

So, as I say, you come down to April 4, and I repeat the question, as I have stated several times, who did she aid and abet? Did she aid and abet an alleged aider and abettor who was an alleged aider and abettor to somebody else? There isn't the slightest bit of evidence that this defendant knew that Helen Bryan was subpoenaed to come down. She came down here because she was subpoenaed to come down. She was in the anteroom because that is where the subpoena required her to be. The only thing you have really in the way of evidence as far as this defendant is concerned, and it isn't enough to give you any understanding of the importance of it; we hear no statement. She appeared before the committee, and she told them she didn't have custody, and I don't know whether it was that she said she would not produce, or would have to—she said quite properly that, "We will have to wait for a decision of the board," of which it appears now she was a member, but one of the silent mem-

bers, while she came there she never said anything. There isn't any evidence, really, that she was ever at a board meeting, really. There is some evidence that she was at a meeting in March but there were no minutes of that meeting, and so when you boil the whole thing down what do you have as far as this defendant is concerned?

I think I should also mention briefly the evidence
404 with reference to a quorum.

THE COURT: With reference to whom?

MR. ROGGE: Quorum. Now, there is something else that I have gone into more carefully as the result of another case I have down here in the District, the evidence on which is to this effect; Mr. Adamson testified, and how willingly he testified, that there were at all times five present. I think he said that because he knew that a quorum was required of five, but what does he do? He places six people and then admitted that two of those came in late. Now, that is less than a quorum. I had it out in a question here, the Christoffel case, that perjury could not be committed before a body consisting of more than one unless there was a quorum present when he was sworn and testified. However, the Judge ruled that the quorum had to be present at the beginning of the session, that was his ruling, but I think under that ruling the evidence is not sufficient here because the evidence showed that at the beginning of the session there was not a quorum present.

I went into the law very carefully in that case; I mean you have cases not only in the House of Representatives itself where they have held that a quorum had to be present or there was no effective action, it has even been written into the Reorganization Act, one of those cases, for instance, that says as to whether a constituted quorum
405 of the House Committee on Tariffs had been present when considering a pending bill, and the following exchange took place:

The House of Representatives Committee was called to meet, and six or seven members were in the room at the

time, I am not sure, six or just what the number was; it required nine to make a quorum. There were not nine present in the room at any given time, but they came into the room, cast their vote and left, but they wanted it to be recorded, and went on to attend to their business. There was an attendance of a quorum at certain times, but they were not all present in the room at one time, and the Speaker said the Chair didn't think six was sufficient, and on page 396-7 the Chair rendered an elaborate opinion on the same subject matter, that after a more careful scrutiny and consideration, the committee sits as a unit, and you can't get a bill by here by getting your report signed by various members not at the entire meeting, if anybody insists on the rule.

This is the way this thing is done in almost every meeting of the House committees; the meeting is regularly called, the chairman is present, the members begin to come in one after another, some remain and others ask to be recorded as present, and finally it shows a quorum present, although actually a quorum is not present, and the chairman goes on to state that he had no doubt but that it is

406 absolutely true that the practice is that one drops in and one drops out as the committee sits. That is all right so long as nobody raises the question, but when the point is raised you have got to have a quorum acting as a quorum. There are other rules to the same effect, and you have finally got it written into the Reorganization Act, and Rule 361 reads: No rule or recommendation shall be reported from any such committee unless a majority of the committee were actually present.

Now, there are any number of authorities in the courts dealing with everything from perjury to corporate action, and all to the same effect, that if there is no quorum present no valid action can take place, and now there are rulings of this Court, one in the Stewart case in 1928, and one in the Christoffel which was just decided this last month, holding that there must be a quorum present, and a

quorum constituting a majority, and that the Government must show beyond a reasonable doubt that that quorum was present.

Now, I contended in one of those cases that the quorum had to be present at the time the man was sworn to testify, and Mr. Justice Curran ruled that the quorum had to be present at the opening of the session. Now, if Your Honor takes the view that Judge Curran did, there was no quorum here.

Mr. Adamson also testified that there were members going in and out. Now, there could not have been a 407 going in and out and only five members there, but even taking his own statement, he listed six persons there and two of those came in late; one of them I think was Landis and another was Mundt. I didn't make a note of it but probably Your Honor did, but he did list six, and two of those came in late, and so he didn't have a quorum, and on that basis there could have been no proper quorum present and, therefore, no contempt.

THE COURT: I went back to my notes on that and I found that my notes reflect that Mr. Adamson stated that a majority of the committee were there all day, and at least five.

MR. ROGGE: Yes, but he went on on cross examination, and I asked—

THE COURT: That was on cross examination.

MR. ROGGE: That may have been, but he also then on cross examination, I asked him to list those who were present, and he listed six, I have six listed as there at the beginning of the session, but he said two of those were late, and he also stated that he couldn't testify who was there at any particular time. The six that he listed were Wood, Mundt, Thomas, Rankin, Bonner, and Landis, I am pretty sure.

THE COURT: Also Peterson, sir, and Murdock and Robinson.

MR. ROGGE: No, he said those three were not there.

408 THE COURT: The question went to all times.
My notes show that there was a question as to all times.

MR. ROGGE: It is my recollection that he did list six as being there. It is my recollection that when I asked him to list those who were there at the beginning of the afternoon session he listed the six I have mentioned, and when I asked him if they were all there at the beginning of the session he said two were late, and I think it was Rankin and Mundt. I know he said two, and I dropped it there because I knew I had less than a quorum.

Now, if you go to the Christoffel case you will find in the first page and a half of that—

THE COURT: Let me understand, you say the mere fact that certain ones asked questions is not indicative of who was present?

MR. ROGGE: Right.

THE COURT: As a member of the Corporation Counsel, I know many were present and asked no questions, although physically present.

MR. ROGGE: And on the other hand a person may come and leave, or come in late, and it was after that, according to the record, that the five named persons were there; but the thing I get back to, if the rule is as Justice Curran announced in the Christoffel case that a quorum had to be present at the beginning of the session, then I say that although the chairman says there were five 409 present, his own specific testimony contradicts it because if it becomes crucial I would like to refer back to the testimony—I haven't had it written up, and I presume Mr. Murray hasn't either—but it is my definite recollection that he ended up with four at the afternoon session and, under the rule he has failed as to a quorum.

However, the thing I get back to, and the one that stands out, it seems to me, above all others, and although I think

the Government failed to establish a quorum there at the opening of the session, as a matter of fact the proof shows there wasn't, and although I think it was erroneous for Your Honor to overrule Miss Bryan's claim of privilege, I nevertheless, even on the basis of the evidence that there is here, I say to Your Honor that we haven't anything as to Ernestina Fleischman. You get down to this aiding and abetting thing, and you have to have a principal who committed the crime, and it isn't there. There isn't the slightest showing as to the subpoenas, and I doubt whether Mr. Murray could say on the basis of this record that there was any aiding and abetting as to those previous to the date of April 4th. He says the same thing as he said before, that they aided and abetted each other, and that isn't enough under the authorities. She knew she had gotten a subpoena. She came down here with a number of people. She saw the others in the anteroom, they had also gotten subpoenas, but there is not the slightest bit 410 of evidence that Ernestina had any knowledge about that, and certainly without any such knowledge you cannot have any crime committed.

The minutes of the meeting which Your Honor let in at the other trial, and which I think Your Honor regarded as the independent evidence, it is the only thing that I can see, and although they are admitted in this case they do not involve Ernestina Fleischman.

As I say, at the December 15th meeting it isn't shown who was present, and at the February 11th meeting it affirmatively shows that Ernestina was not there, so you get down to a very simple, narrow point in this case that Ernestina Fleischman got a subpoena to come here on April 4th. She came down as she had to. She didn't have custody of the books and records, and she didn't produce them; she couldn't produce them. What else is there in this case, Judge? Aside from her own statement there is this evidence rule which I argued strongly at the other trial, and I think I should argue more strongly here, except I have

been talking about aiding and abetting because I have that clear fact in my own mind, and so as to the independent evidence, as to the elements of the offense, they just aren't there.

I wish I could find words to make it forceful enough to show Your Honor what you have really in this case. All you get down to is that she got a subpoena. She 411 appeared, as she had to, but didn't have the books and records and, therefore, could not produce, and that is not a crime, and not aiding and abetting.

I get back to the same point I have gotten up to time and time again; who did she aid and abet? Who was the principal who committed what crime, Judge?

It just isn't there and, therefore, I say to you that viewing the evidence here, and that is even less than you had in the other trial, Your Honor has but one course left open on the basis of the record before Your Honor; and I know that we are supposed to exclude from our minds the facts we know about in another trial, I know that is hard to do, but I know if it is necessary to do it Your Honor will do it, but even so, even omitting all that, what do you have here. A couple of pieces of evidence that I think Your Honor regarded as, and as the law in the other case doesn't apply here because Ernestina isn't involved, and I think that is very easily explainable because she was not an active participant, there is not a shred of evidence that shows Ernestina ever did one single thing except to respond to the subpoena, that is all you have from this examination, and she had to respond to that subpoena.

What more is there in this record with reference to Ernestina, and I say you have but one thing to do with this defendant; I know Your Honor thinks in your own 412 mind, and I can understand your feeling, while she was one of the executive board and they should all be treated alike, but that doesn't necessarily follow.

I argued at the other trial that those who voted by telephone, or who were not present at the February 11th

meeting, should have been dismissed from the case, and now I have a situation where you have less than that. In the other case we had all the trappings, the many other things, and we couldn't clearly think this through, I couldn't, on this aiding and abetting. I think I can now, and I think when you get down to that you will have but one point, and it gets back to it time and time again, and that is the point who was the principal that committed what crime that Ernestina Fleischman knew about, and whom she aided and abetted, and it just isn't there, and since you have a case of a woman who did not participate actively in the affairs of this organization, and as to whom you have nothing except she got a subpoena and responded to it, Your Honor can reach but one point in this case and that is to direct a verdict of acquittal.

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424 **MR. ROGGE:** Mr. Murray stated in the course of his argument that some of his references were to the Barsky case, and I also had a feeling that when he was arguing it was that case and not this case. We have only to consider this case. The other statement of the House committee could not be introduced and considered against Ernestina Fleischman, even if it had been introduced.

Following out the question of Mr. Murray to Mr. Shumlin and the effort to get those minutes of meetings in, and I opposed it as strenuously as I could, and after they got in you examined—

MR. MURRAY: Are you opposing very strenuously the stuff I had in the Barsky case?

MR. ROGGE: If they were sent out, they wouldn't have added anything anyway, but after all this happened—they brought up documents, brought in here, which Ernestina assumes are all, but doesn't know; why not oppose it strenuously!—because it will affirmatively show that Ernestina Fleischman was not present. As far as aiding and

abetting was concerned, Mr. Murray made no effort to answer that.

425 THE COURT: Let's not review that too lengthily, Mr. Rogge. Do you recognize the difference between the cases you have cited as to the statutory situation in this jurisdiction?

MR. ROGGE: I would have to answer that by saying I don't know what the statutory situation is which you are referring to.

THE COURT: Take the situation he put about the safe.

MR. ROGGE: Ten carrying a safe; would anybody attempt to tell the Court that ten men carrying a safe proved that they all stole the safe?

THE COURT: Sir?

MR. ROGGE: I say if that is all he proved, they haven't proved the case.

THE COURT: No, I am talking about the need for the Government in this particular instance to show that one of the ten was the principal in order to show the others were aiding and abetting.

MR. ROGGE: In answer to that I will say one of these cases I cited, being a 1947 case, that there was no other provision, they no longer required that showing that one of them was principal. I didn't know about it yesterday; I was just proceeding to make a distinction that was in the other case; we got into the field of aiding and abetting, and I felt I was in a big field, and now Mr. Murray tells me that he says we are all aiding and abetting, and I

426 don't know where we are.

THE COURT: You can't find fault with the thing being in the case; most lawyers engage in that hope.

MR. ROGGE: I hope not.

THE COURT: I was only being facetious.

MR. ROGGE: No, that is all right, because Your Honor describes the way I feel about his argument. I feel I am in some kind of a shell game, he is pulling a rabbit out of

the hat, his answer as to aiders and abettors; but if there is a statute that says you do not have to have that, and he referred to the statute and he referred to the Patten case. Now, the statute you refer to I am not familiar with, but in the Patten case you had a principal there, a group of people, as he describes it. I am not familiar with the Patten case; they were slugging a man, and one of them had a knife and worked on him until they killed him, and there you had a crime. Now, if there is any statute which requires a principal—

THE COURT: Let's assume that there has been a crime committed, and use his example, say housebreaking and larceny, housebreaking and grand larceny, the case of the safe proposition; suppose it is shown that ten men go into this place, and ten men do physically lift and carry away the safe, and it is further shown that it is the property of A, who is principal there?

427 MR. ROGGE: I will agree with you under those circumstances they are all principals, but that is not this case. The only comparable thing you can say in this case before Your Honor is that Ernestina and the other members of the executive board all came down to the anteroom of the House committee, and why? Because the House committee process required them to be there.

And now, let me put Your Honor's case, and it is almost obiter dictum in this proceeding; I am satisfied Mr. Murray misunderstood Shumlin's testimony. Shumlin did not testify that there was any meeting of the executive board between the issuing of the subpoena and April 4. That meeting took place, I remember this distinctly, before the service of subpoenas. There was some other meeting referred to as taking place in Weinsteins' home, and there was affirmative evidence that Mrs. Fleischman was not there.

MR. MURRAY: May I interrupt to say he is probably right about that; my recollection is not too good on that.

MR. ROGGE: The only meeting that took place after the service of the subpoena is that meeting in Bobbie Wein-

stein's home, and there was affirmative testimony that Ernestina Fleischman was not there.

THE COURT: I would like to be advised about this, gentlemen; Mr. Shumlin did state that there had been a meeting in re the records, a meeting in March in 428 Mrs. Fleischman's presence?

MR. ROGGE: Yes, but that was before the service of the subpoenas.

THE COURT: I thought you referred to March.

MR. ROGGE: Yes, but that was before the service of the subpoenas.

THE COURT: Your point is that this was anticipatory of the service of the subpoena?

MR. ROGGE: No, my point is that at the time of that meeting, the subpoenas on Ernestina and others had not been thought of by the House committee.

THE COURT: That is what I understood you to say, and I was correct that the meeting did take place in re the records, and according to Mr. Shumlin Mrs. Fleischman was present.

MR. ROGGE: That is correct. It was before March 29th. I am sure of that. As I remember his testimony, there was a meeting that took place in March. It was before the service of the subpoenas which would be before March 28th, and the House committee did not decide on its subpoenas until all of a sudden, the House committee did not decide on its subpoenas until March 28th, so it could not have been with reference to those subpoenas.

Now, it is also true that Mr. Shumlin testified that at 429 that meeting a report was made by Barsky on his appearance and no action was taken at that meeting; as I recall his statement, that there had been a report by Dr. Barsky and a statement by counsel as to legal positions. Now, Mr. Murray hasn't shown, and couldn't show, that that amounted to an aiding and abetting of Barsky because by proper statement of facts Ernestina did not know of it until after the event took place. So the

question I am about to put to Your Honor is almost what is here, aside from that one meeting,—or let's start from this starting point; suppose that Ernestina had been out of town, let's say October 1, 1945, until March 29, the date she was served with the subpoena. She doesn't have a set of books and records. Now, what is she supposed to do? What crime does she commit by responding to that subpoena by saying, "I do not have the books and records!" That is what you get down to in this case. There isn't any more than that, with two additional meetings we had in the other case, and which were introduced with minutes of the meetings here; when you get right down to it they show that Ernestina did not participate. As I say, the only thing you have is the March meeting before these subpoenas were even thought of, at which there was a report by Dr. Barsky at which no action was taken, and Ernestina presumably sat there and listened.

Now, you also had a meeting at the Weinstein home after the subpoenas were served, but Ernestina wasn't there.

What do you possibly have in this case to go to a 430 jury with? I will say to you, getting back to this point again, and I want to think the thing clearly through, but Mr. Murray says now there is a statute as to this aiding and abetting, and there once more I feel he has pulled a rabbit out of the hat. If there is any statute which rules that if some principal has committed some crime before there is an aider and abettor, I want to see it. If there is one, I am again confused right at the point where I thought I had thought it through clearly.

THE COURT: You speak of knowledge, Mr. Rogge. Knowledge may be ascertained in various ways, you will admit?

MR. ROGGE: Yes.

THE COURT: Circumstances may be such as to aid by having knowledge.

MR. ROGGE: That is correct, Judge, I will concede that, but I do not think it is in this case. I am following

the same fault that Mr. Murray did by going to the other case, and maybe we can't avoid it, I think we should; but the subpoenas of March 28th were suddenly decided upon. They came as a surprise to everybody. That was the first point on which they knew that there were going to be those subpoenas, on March 28th, so what happened to that, they couldn't have known about that.

THE COURT: But have been participants in this.

MR. ROGGE: I want to get down to what we have actually here. I am satisfied you cannot have aiding 431 and abetting with reference to the December subpoena because not only did the Government not do anything with reference to it, but there is not the slightest evidence that Ernestina knew anything about the subpoena.

THE COURT: Isn't the substance and kernel of this whole thing the failure to produce records? Isn't that the kernel of the whole situation?

MR. ROGGE: Well, I think it is refusal to produce records that I can't say you have custody of, but under Your Honor's ruling, by which I am now bound, refusal to produce records over which you have domination and control, that was Your Honor's ruling, and the way the Court of Appeals pitched it was on the Wilson case in which they say "they", meaning the executive board directed it and, of course, you have no evidence, not the slightest. On knowledge, yes; knowledge may be gotten by inference, but there is not the slightest inference that you have Ernestina present at any of these meetings, there isn't the slightest inference that she knew about Helen Bryan's or Dr. Barsky's subpoena prior to the time of responding to it took place. The meeting that refers to Dr. Barsky's subpoena is obviously out; Ernestina is affirmatively shown not to have been present. The first time you have Ernestina coming into this case is the testimony of Shumlin about a meeting, and I don't know just what he is referring to, because there are no meetings here in the

evidence, and the meeting at which Dr. Barsky made a report and no action was taken. In other words, as I gather his story and boil it all down together, he thought Ernestina was there and I suppose even though he was, I suppose the Government's theory, in a concert of action, that is at least their theory, I don't know whether much weight should be given to it, but he said he thought she was there, but even so what did they take up? Dr. Barsky makes a report presumably along the lines that he was served with a subpoena, "And I went down to the House committee and I said I don't have the records." I do not know how complete a report he made on his own testimony, and Mr. Wolf went to make a statement on the legal position. I don't know what it was. The record doesn't show, but that is all that took place; not a single bit of action was taken.

Now, up to that point how can you have Ernestina guilty of anything, even with Mr. Murray's amorphous thinking about aiders and abettors? So what you get down to is the last batch of subpoenas which were issued on March 28, and they were not thought of before that date. The House committee originally tried to cite the members of the executive board on the basis of Dr. Barsky's refusal, and there was argument on that in Congress and they said "no, you can't do it that way," but without warning, and without anybody but the House committee itself knowing

it, on March 28th, and you get down to that date, and
 433 up to that point you haven't got Ernestina involved
 as to knowledge, and now you get down to March
 28th when subpoenas are gotten out on the members of the
 executive board, members of the Joint Anti-Fascist Refu-
 gee Committee, yes, Ernestina gets one of those, and she is
 down here out in the anteroom of the House committee.
 She has to be there. Who is the principal who committed
 what crime? She hasn't been at any, not a single one, of
 their discussions, but she was a member, yes, but could
 not have been very active because one of them had to state

she was under the impression she was a member of the board. Why did she have to state it that way? Evidently because Ernestina did not participate in their discussions; and she consulted a lawyer—I will take that back, that is an overstatement—nobody places Ernestina in the lawyer's office. Others were there, but not a single one of them places Ernestina in Mr. Wolf's office, and the only thing you have, you have absolutely no independent evidence whatsoever. All you have is Ernestina's own statement, and it may go so far as to say she may have consulted with counsel, if she made any independent evidence, and you don't have it. All you have is her own statement, "I had this statement." Maybe she said she got it from a lawyer, I don't know. There is no independent evidence of it, and you just don't have a case.

I know Your Honor will have the feeling that, being a member of the executive board, she should be treated 434 the same as the others, and, in one sense, that is a just way to approach it, but, on the other hand, you have to be guided by the facts which are before you. It is just as if she had been out of town the whole time until March 29th and was served with a subpoena. It boils down to that. You have nothing.

Now, between March 28th and April 4th what is her crime? I am still satisfied, as I have been thinking this thing over in my own mind, that Mr. Murray cannot get away from the fact, he has got to show me the statement in black and white that when you get an aiding and abetting you do not have to have a principal to crimes. I am just satisfied that isn't so. You might go so far as to say that they are aiders and abettors. I did not challenge that, but you still had to have some principal who committed some crime.

THE COURT: Couldn't they all be principals?

MR. ROGGE: Yes, they could all be principals, but what crime did they commit?

Let's look at the Wilson case again, which the Court of Appeals passed on. It says if your members have the right to direct the corporation and fail to take appropriate action; in order to be free of guilt here did Ernestina have to be a propagandist and go to the board members and say before taking action—

THE COURT (interposing): When she takes on the responsibility of an executive board member certain 435 responsibilities flow along with that when she does it.

MR. ROGGE: She is a member of the executive board. The evidence has shown that. But if we get down to that Your Honor has to admit that he doesn't have a suit. The record also shows that, what you get down to is that Ernestina, in order not to be guilty here, had to see to it that some sort of an affirmative action was taken, and I do not think that is required even under the Wilson case.

Of course, under Your Honor's theory they are all principals, you do not have aiders and abettors, and again I don't know just what theory you are proceeding on in this case. At the outset Mr. Murray said they were aiders and abettors, and now we are down to the basis that they are all principals. If they are all principals, again I have no clear conception as to just what the crime is, and I go back to the Wilson case. Now, what is there there?

Now, as a matter of fact, one of the witnesses was asked, it was the witness who accompanied Helen Bryan when she came down in January, was asked did Ernestina know about that, and she had to say she didn't know, so that the evidence you have here points in the direction Your Honor states about inferences. If there can be inferences in criminal cases, and I say to Your Honor that the facts here negative any such possibility in this case; what you get

down to is one—you have just a member of the executive board with a subpoena on March 29th. Now,

does that mean that she had to go back to see if she could convince the members of the executive board to turn over the books and records in order to be free of guilt?

Mr. Murray's argument seems to get down to that because he quoted at length as to her questioning as to how she would vote in the board, and she said she didn't know how she would vote in the board. Would that become a crime when one says, "I don't know how I will act in the vote." That is really all you get down to in this case. I daresay if I were a member of an organization of a board of directors and someone asked me, "How are you going to vote on this proposition," I might very well say, "I will have to wait and see what the discussion leads to." Certainly that can't be a crime.

THE COURT: Of course, the law is if you guess wrong as to what the law is that is your responsibility.

MR. ROGGE: That's right, Judge, I am presumed to know, that is correct, but there also has to be a criminal intent, and you can't spell criminal intent out of a person saying when asked what will you do in this situation, referring to a vote; I find it impossible to see how that can be a crime. A person is asked, "How will you act when this thing comes up at some future point," and you say you don't know. What you get down to, Judge, and I hope it is a place we haven't yet reached in our law, that Ernestina is a member of the executive board, and, therefore, she should be guilty.

437 THE COURT: I wouldn't reduce it to that.

MR. ROGGE: Unless, as I say, Mr. Murray can show me this statute he refers to as to aiding and abetting. As I read these cases, it is the one solid thing I can find, and I thought it had cleared it up until this discussion as to aiding and abetting, namely, that you had to have first a principal, I will say some principal who committed some crime. As the Court put it in 159 F. 2d, and I can't put it any better, decided in 1947, I can't help feeling that is still the law:

"One cannot aid and abet in the commission of a crime unless there is another who has committed the offense. In other words, one cannot be an aider and abettor of himself in the commission of an offense."

That is really what you get down to here, and so I can't see—on the quorum point, incidentally, I know what I contended before Judge Curran; I contended that one could not be guilty of perjury unless there was a forum at the time the witness was sworn and gave the perjured testimony, and Judge Curran ruled that at the time the quorum had to be present was at the beginning of the session, so I just take his ruling—I don't know how much follows from it—I think under the authorities not only has a quorum to be present, but the Government has to meet it with the burden of proof. I can go into the authorities; I do not want to extend this, I am satisfied that al-
438 though Mr. Adamson said there were five there, he had in mind the quorum rule requiring that.

THE COURT: I think he said at least five.

MR. ROGGE: Yes, but when he got down to specific names he mentioned six as being present at the beginning, but two late; how late they were I don't know, but I do not think the Government has met their burden of proof on that, and if you were to say to me now, "What is the largest, really the largest hurdle for the Government in this case," I come down again to say they have proven nothing as to Ernestina Fleischman except that she came down here and did not have the books and records, that is all, and that is not enough to make out a crime; and I say on aiding and abetting, unless I am shown a statute, I have been thinking it over on aiding and abetting, you have a principal, or some principal, who committed some crime before you get to Ernestina, and I don't think you get to her.

THE COURT: Couldn't you have that on the theory of trying the members of the board of directors of the governing body itself?

MR. ROGGE: I think under the decision of the Court of Appeals, referring to the Wilson case, I would say no, Judge, because you have to have some individual here.

THE COURT: That would be as to those who were designated as principals.

439 MR. ROGGE: No, I say the furtherest this case goes, the Wilson case, upon which the Barsky case was decided, is that if you have a situation where, and you did have, you had a subpoena on Helen Bryan, and you had one on Dr. Barsky, you might contend, and I think that is stretching it, that those who were present at the February meeting, you might under those circumstances, and I think that is stretching it, to call Dr. Barsky and Helen Bryan and the rest of them who participated in that meeting as aiders and abettors, I think that is the furtherest you get, that meeting having affirmatively shown that Ernestina Fleischman wasn't there.

Will Your Honor indulge me? My associate pointed out that if it is true, you get down to either Ernestina was a principal or she was an aider or abettor. Now, if she was an aider and abettor, who were the principals? Well, you might say all the other members of the executive board were the principals, but there isn't any showing that she aided and abetted any of them, and if she was a principal at that time, if that is the way she is going to be taken, what did she do? She got this subpoena and came down here and said, "I don't have custody," which she didn't have. I think even the Wilson case—I think the Court of Appeals in the Barsky case went too far, but even there they just come back to this situation, if they, that writ being directed to the corporation, prevented compliance, I say that that might hold if you say that Dr. Barsky was 440 the principal on February 15th, those who participated in the meeting of February 11th were aiders and abettors and became principals with him, but you have no such situation on April 4th, and I say under the very language of the Wilson case you do not have a case against Ernestina Fleischman, and therefore Your Honor should direct a verdict of acquittal.

THE COURT: I will deny your motion at this time, Mr. Rogge.

MR. ROGGE: The defendant then rests and renews the motion for acquittal.

Charge to the Jury

THE COURT (Keech, J.): Members of the jury, and alternate juror, the indictment in this case consists of two counts, and charges 17 defendants named therein with violations of Title 18, Section 88, and Title 2 of Section 192, of the United States Code.

Count 1 of the indictment deals with the violation of Section 88 of Title 18, conspiracy to defraud the United States. As to that count, you are advised that the Court has entered a judgment of acquittal as to each and every defendant. When you receive the indictment you will, therefore, not concern yourselves with the parts deleted by pencil.

Count 2 of the indictment charges violation of Title 2, Section 192. The substance of that section, as applicable in this case is, and I quote:

“Every person who having been summoned as a witness by the authority of either House of Congress 474 to give testimony or to produce papers upon any matter under inquiry before * * * any committee of either House of Congress, willfully makes default * * * shall be deemed guilty of a misdemeanor.”

While the indictment named 17 defendants, your verdict in this case will be “guilty” or “not guilty” of Count 2 as to the defendant Ernestina G. Fleischman, only.

It is my duty to instruct you as to the law applicable to the case, and that must govern you in your deliberations and in arriving at your conclusion. You are bound and obligated to follow the Court’s instructions as to the law, but you, members of the jury, are the sole judges of the facts, and you must determine the facts for yourselves, solely on the basis of the relevant evidence adduced before you.

The Court is permitted to summarize and discuss the evidence in order to assist the jury in arriving at its conclusions; but, if your recollection of the evidence differs

in any respect from the Court's recollection, then your recollection must prevail, because the final decision on the facts is entirely within your province, while my instructions are binding on you only as to the law.

The fact that a defendant has been indicted and is charged with a⁶ crime is not in itself to be taken as an indication of guilt, and no inference is to be drawn
475 against her from that fact, because an indictment is

merely the machinery and procedure that the law provides for bringing a defendant before the Court and placing her on trial. That is the only function of an indictment, and this is the indictment which will be given you by the Clerk when you retire to consider the case.

Every defendant in a criminal case is presumed to be innocent, and this presumption of innocence attaches to the defendant throughout the trial. The burden of proof is on the Government to prove the defendant guilty beyond a reasonable doubt, and unless the Government sustains this burden and proves beyond a reasonable doubt that she committed the crime with which she is charged, you must find her not guilty.

But, you might ask, what is meant by "a reasonable doubt?" It does not mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a moral certainty and not proof to an absolute or a mathematical certainty. By a reasonable doubt, as its name implies, is meant a doubt based on reason, not any whimsical or capricious conjecture. It is a doubt which is reasonable in view of all the evidence. If, after impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied with the guilt of the defendant, you have a reasonable doubt. But, if after such impartial comparison and consideration of all the evidence you
476 can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your personal affairs, then you have no reasonable doubt.

If the facts in this case with regard to the defendant are as consistent with her innocence as with her guilt, you must find the defendant not guilty.

In determining whether the Government has established the charge against the defendant beyond a reasonable doubt, you will consider and weigh all the testimony of all the witnesses who have testified before you. As you are the sole judges of the facts, so, too, are you the sole judges of the credibility of the witnesses. In determining whether to believe the testimony of any witness, and in weighing the testimony of any witness, you may consider his demeanor on the stand; his manner of testifying; whether he impresses you as having an accurate memory and recollection, and whether he impresses you as a truth-telling individual.

Count 2 of the indictment charges the defendant with contempt of Congress in wilfully failing and refusing to produce certain records subpoenaed by a committee of the House of Representatives. It is alleged that the House Committee on Un-American Activities was conducting an investigation into subversive and un-American propaganda activities in the United States which attack
477 the principle of the form of government guaranteed by the Constitution of the United States, an inquiry which was authorized by House Resolution 5 of the Seventy-Ninth Congress, adopted January 3, 1945; that in the course of this investigation the Un-American Activities Committee was seeking to obtain access to the records of the Joint Anti-Fascist Refugee Committee; that the defendants were all members of the governing body, or executive board, of the Joint Anti-Fascist Refugee Committee. It is further alleged that the defendants and each of them were summoned to appear before the Un-American Activities Committee on April 4, 1946, by subpoena directing the association by name and also by subpoena directing each of the defendants to produce before the committee at the time stated certain records of the Refugee

Committee, specifically, all books, ledgers, records, and papers relating to the receipt and disbursement of money by or on account of the Joint Anti-Fascist Refugee Committee, or any subsidiary or sub-committee thereof, together with all correspondence and memoranda of communications by any means whatsoever with persons in foreign countries for the period from January 1, 1945, to March 29, 1946. It is further alleged that, in response to these subpoenas, each and all of the defendants, including the defendant Fleischman, appeared before the Congressional Committee on April 4, 1946, but failed to produce the records called for in the subpoenas, as they had 478 power to do, and thereby wilfully made default.

The Government has introduced evidence in support of the various allegations of the indictment.

The defense has not disputed that a paper purporting to be a subpoena was served upon each of the defendants, but has intimated that such papers were not, in fact, proper subpoenas issued by authority of a House of Congress.

The Court instructs you, as a matter of law, that the Committee on Un-American Activities of the House of Representatives was a validly constituted committee of the Congress, and was at the time of the defendant's appearance before it; that said committee had jurisdiction over the matters under consideration; that the documents requested were pertinent thereto; that the committee had a reasonable basis for issuing the subpoenas in question; and that the subpoenas were not unreasonable in requesting production of the various documents described therein; that the members of the committee before whom the defendants appeared, pursuant to the subpoenas served on them, constituted a sufficient quorum to carry on the investigation.

The Court further instructs you, as a matter of law, that, in substance, the paper alleged to have been served upon the defendant constituted an adequate subpoena.

There is no dispute that the defendant Fleischman was served with a subpoena, that she appeared before 479 the committee, and that she did not produce the subpoenaed records. But the defense contends that the defendant Fleischman individually did not personally have possession, custody, or control over any of the documents requested in the subpoena, that she was unable to comply with the request to produce them, and, therefore, her failure to comply was not a wilful default.

Similarly, there has been testimony that one Helen R. Bryan, executive secretary of the Joint Anti-Fascist Refugee Committee, was served and appeared on this and a previous occasion, and that she failed to produce the subpoenaed records.

Likewise, there was testimony that the defendant Barsky, chairman of the executive board, was subpoenaed, appeared, and failed to produce the subpoenaed records on this as well as a previous occasion.

There has also been testimony that the other members of the executive board appeared before the committee and failed to produce the records subpoenaed, and that all, or practically all of them, made a statement similar to that of the defendant Fleischman, that she did not individually have custody and control of the records.

The constitution and by-laws of the Joint Anti-Fascist Refugee Committee has been put in evidence to show that the executive board was the governing body of the committee.

There has also been introduced evidence with reference to certain meetings of and resolutions adopted by the executive board with reference to the subpoenas issued by the House Un-American Activities Committee and custody of the records of the committee.

If you find that the members of the executive board, directly or indirectly, had custody or dominion and control over the records subpoenaed and could have produced the records called for, but wilfully failed and refused to

do so, and that the defendant Fleischman acted in concert with other members of the executive board, either throughout or at any point, to prevent the committee from getting the subpoenaed records, then you may find the defendant Fleischman guilty, if you find that the other elements hereinafter set out have been proved by the United States beyond a reasonable doubt.

I instruct you that you are not to concern yourselves with evidence ruled out by the Court, nor are you to consider colloquies between opposing counsel or between the Court and counsel, as they are not evidence.

I instruct you that the opening statements of counsel for the Government and for the defendant, as well as their closing arguments, are not evidence.

I want to stress two points to you:

First: Your determination of the guilt or innocence of the defendant must be reached solely on the basis of the relevant evidence adduced at this trial, without 481 any feeling or emotion, bias or prejudice, without any anger on the one hand, and without any sympathy on the other.

Second: The nature of the activities of the defendant, or of the organization with which she was connected, is not an issue in this case, and it is your duty entirely to disregard any speculation on that subject. The issues which you are called upon to determine and the basic elements of the offense with which defendant is charged have been and will be defined by the Court, and you should confine your consideration to them.

It is incumbent upon the Government to prove each and all of the essential elements of the crime charged. Briefly, the elements of this offense, as applicable to the defendant, are as follows:

1. That the Chairman of the Committee on Un-American Activities of the House of Representatives caused to be prepared a subpoena directing the defendant to appear before the committee and produce the records described therein.

2. That such subpoena was sign'd by the chairman of said committee, and was served by a person designated by said chairman by placing the same in the possession of the defendant.

3. That the defendant, alone or in concert with one or more of the defendants, had custody or dominion and control over such records.

482 4. That the defendant, acting alone or in concert with one or more of the defendants and with knowledge that she had been served with such subpoena, wilfully made default, that is, wilfully failed to produce the records called for by the subpoena.

The Court instructs you that it is the law that when two or more persons act in concert or participate in an illegal activity, each is responsible, irrespective of the part he plays in the activity; or if one person aids or abets, advises, or counsels, or encourages another to commit an offense, he is equally liable under the criminal law with the one who physically commits it. If you find that the defendant did not participate in these activities, or did not aid, abet, counsel or advise another to commit an offense, you shall find her not guilty.

Several times during this charge I have used the term "wilful" or "wilfully." "Wilful" as used in 2 United States Code, Section 192, the section under which defendants were indicted, means "deliberate and intentional" and not inadvertent or accidental. Thus, the motive of the defendant in failing to comply with the subpoena and her reason for such failure are not material, so long as you find that she did so intentionally and deliberately.

You may ask how you may determine "intent." When you do a thing on purpose, you do that which you 483 intend to do. Now, the intention that a person has in doing a certain act is to be gathered by his actions and by his words at that time and preceding that time. Only the all-seeing eye of the Almighty can read the secrets of the human mind, and in the administration of

justice men must seek the intention and gather it from words and actions of the person involved as shown by the testimony in the case.

The charge in this indictment, although sometimes referred to as "contempt," does not mean a personal animosity or dislike toward the Congressional Committee or any of its members. The charge consists of the elements as I have defined them to you.

If you believe the prosecution has proved, beyond a reasonable doubt, each and all of the elements, as outlined and explained, then you must find the defendant guilty.

If, on the other hand, you believe the Government has not proved, beyond a reasonable doubt, each and all of the elements, then you must find the defendant not guilty.

The Court repeats to you that it has entered a judgment as to each and all of the defendants so far as Count 1 is concerned, and, further, it repeats to you that that is no concern of yours.

You will, therefore, render a verdict as to Count a, of guilty or not guilty as to the defendant Fleischman only.

You, of course, know that your verdict must be 484 unanimous.

Do counsel desire to come to the bench?

(Thereupon counsel approached the Court's bench and the following occurred out of the hearing of the jury:)

MR. WOLF: If the Court please, we suggest that all reference to Count 1 should have been eliminated; no reference to Count 1 should have been made. That should not have been to this jury because it was stricken out.

THE COURT: It will physically have to come out of the indictment, and that is all I did.

MR. WOLF: We were going to make a request that that portion of the indictment be stricken out physically.

THE COURT: It comes too late now, sir.

MR. WOLF: In addition, we object to referring to all other defendants, as in this case there has been no other defendants. The charge given leaves the implication with

regard to the action as to the other defendants on Count 2 of the indictment, since the Court specifically stated what happened to Count 1, and we charge that no implication is to be made by the jury with regard to any action in Count 2 with regard to the other defendants.

THE COURT: Let's see specifically what you want.

MR. WOLF: "I charge that the jury is not to find any implication from the indictment, or from the statement I have made with regard to other defendants, that they have been found guilty of Count 2 of the indictment."

485 THE COURT: Now, I have not made any such intimation that they have been found guilty, and that is what you are implying here, as I read it.

MR. WOLF: The Court has stated that they had not been found guilty, but had been found not guilty on Count 1.

THE COURT: That is right.

MR. WOLF: Thus leaving in the air the implication with reference to Count 2. Of course, I think the better way would have been not to refer to Count 1.

THE COURT: That was physically impossible. I said in the first part that no inference of guilt is to be drawn as to that part. You don't think what I have said here that you are concerned with one defendant and one defendant only is adequate for your purpose? I specifically stated that. You think it over.

MR. WOLF: May I go on?

THE COURT: Yes, if you can finish that. As to your first part I am satisfied I adequately covered that inasmuch as I said that as to the indictment no inference of guilt is to be drawn.

MR. WOLF: No implication is to be drawn from any statement with regard to "other defendants," that such other defendants have been found guilty of any crime; or possibly it is suggested that in order to overcome repetition of the Court's previous statement, that the 486 Court has entered a judgment of acquittal as to Count 1.

THE COURT: That is what I did say.

MR. ROGGE: That was already said.

THE COURT: "The Court repeats to you that it has entered a judgment of acquittal as to all of the defendants as far as Count 1 is concerned."

MR. WOLF: You said acquittal?

THE COURT: I did, sir.

MR. WOLF: Well, possibly repetition of that originally made with regard to the judgment of acquittal on the first count might have a suspicious effect.

THE COURT: Is that what you want me to do with reference to that?

MR. MURRAY: Your Honor, what really happened as to this particular defendant is that, with the permission of the Court, we dismissed the indictment as to her at the beginning of this trial.

MR. WOLF: That is correct.

MR. MURRAY: She was not included in the first trial.

THE COURT: That is correct. I am in error there. You want me to say as to Count 1—

MR. WOLF: That Count 1 has been dismissed.

MR. MURRAY: The first count of the indictment has been dismissed as to this defendant.

487 **THE COURT:** As to Count 1 the Court instructs the Government dismissed that count in so far as the defendant Fleischman is concerned. Is that what you want me to say?

MR. WOLF: Yes.

THE COURT: All right.

MR. WOLF: We object to the part of the charge which states that the Government has introduced evidence in support of the various allegations of the indictment; to that part dealing with the subpoenas.

THE COURT: All right, sir.

MR. WOLF: To the charge that the House of Representatives Un-American Activities Committee was a validly constituted committee of the Congress; that it had

jurisdiction over the matters under consideration; that the documents requested were pertinent; that the committee had a reasonable basis for issuing the subpoenas in question; that the subpoenas were not unreasonable in requesting production of the various documents described therein; and that the members of the committee present constituted a sufficient quorum.

I object further to the charge that the paper alleged to have been served on the defendant constituted an adequate subpoena, and to that portion of the charge which states that there was testimony to the effect that Miss Bryan failed to produce the records on April 4.

THE COURT: I didn't say on April 4, I believe I did in effect.

488 MR. WOLF: An additional objection to that portion of the charge which referred to the defendant, directly or indirectly, having dominion or control, acting in concert either there or at any other point, to prevent it getting records.

I do not recall the exact wording, but I object to that portion of the charge which makes any reference to concert with one or more of the other defendants on dominion or control. That is repeated, that is why I am repeating the objection; to that portion of the charge which describes as an element, essential element in the case; in describing the essential elements of the case you mentioned acting in concert with one or more of the defendants; and to that portion of the charge which deals with aiding and abetting, since there was no element of proof with regard to that; acting in concert or participating in any activity since there was no element of proof in the case with regard to that. And we object to the Court's charge with regard to wilfulness, and the Court's charge with regard to intent, explanation of intent.

I think I stated before we think the indictment should be so physically amended now in its presentation to the jury so that all that is left is that portion of Count 2 as relates to the defendant.

THE COURT: I can't change the indictment; I
489 am not going to do that.

MR. WOLF: That is requested.

THE COURT: All right, and you know from the previous case I marked out certain things, with the statement to the jury which have been deleted.

MR. WOLF: There is just one other matter; I think by the rules we are required to state in detail the basis for the objection to the charge. The last time that was waived, so we need not go into that.

MR. MURRAY: They have been pretty fully argued.

THE COURT: Let me say, "As to Count 1 the Court instructs you the Government has dismissed that charge in so far as the defendant Fleischman is concerned."

(Thereupon counsel returned to the trial table and in the hearing of the jury, the following occurred:)

THE COURT: I have one further instruction to you, members of the jury as a result of the conference you have noted at the bench, and that is this: As to Count 1 the Court instructs you that the Government has dismissed Count 1 in so far as the defendant Fleischman is concerned.

You may now retire to the jury room to carefully and deliberately consider this case in the light of the evidence adduced and the instructions which I have given you.

After reaching the jury room, you will select a foreman from among your group who will represent you 490 when you return to the Court with your verdict.

You may now retire and consider the case.

The Court will ask the alternate juror to remain and come to the bench after the jury has retired.

(Thereupon at 3:45 o'clock p. m. the jury retired to the jury room to consider of its verdict.)

THE COURT: Mr. Harley, it is apparently obvious to you why you were drawn, merely for the purpose of having an extra juror in the event one of the other jurors became ill, or for some reason was not able to carry on

with the case, and that is why you are called an alternate juror. I will say to you on behalf of counsel for the Government, counsel for the defense, and on behalf of the Court, we thank you for your service. You are excused.

490 **ALTERNATE JUROR HARLEY:** Thank you.
 (Thereupon Court was recessed to await the return of the jury.)

(Thereupon at 6:15 o'clock p. m. the jury was by the Marshal taken to dinner and Court was recessed to reconvene at 7:30 o'clock p. m., whereupon the Court was recessed to further await the return of the jury.)

(Thereupon at 8:10 o'clock p. m., the jury notified the deputy marshal, and the deputy marshal informed the Court that the jury was ready with its verdict.)

491 (Thereupon, the Court having resumed the bench, counsel for the Government, counsel for the defendant, and the defendant being present, the jury was returned into the courtroom and the following occurred:)

THE DEPUTY CLERK OF THE COURT (Mr. Morgan): Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN OF THE JURY: We have.

THE DEPUTY CLERK OF THE COURT: What say you as to the defendant, Ernestina Fleischman, on the second count of the indictment?

THE FOREMAN OF THE JURY: Guilty as charged.

493 **MR. ROGGE:** I wish to renew, Judge, the motion for acquittal or, in the alternative, a motion for a new trial.

THE COURT: Very well, you have the time necessary in which you wish to file, Mr. Rogge.

Is it agreeable that the defendant stay on bond?

MR. ROGGE: Mr. Murray is agreeable.

MR. MURRAY: Yes.

THE COURT: She may stay on bond pending sentence.

497

Washington, D. C.,

Thursday, April 8, 1948.

The above-entitled matter came on for hearing on motion for new trial or, in the alternative, a verdict of acquittal, at 11:20 o'clock a.m., Thursday, April 8, 1948, in The District Court of the United States for the District of Columbia in the Court House in the City of Washington, District of Columbia.

BEFORE:

HONORABLE RICHMOND B. KEECH, Associate Justice of The District Court of the United States for the District of Columbia.

APPEARANCES:

CHARLES B. MURRAY, ESQUIRE, Assistant United States Attorney on behalf of the United States;

O. JOHN ROGGE, ESQUIRE; BENEDICT WOLF, ESQUIRE, and ROBERT H. GOLDMAN, ESQUIRE, on behalf of the Defendant.

498

Proceedings

MR. ROGGE: May we approach the bench?

THE COURT: Yes, sir.

(Thereupon counsel approached the Court's bench and the following occurred:)

MR. ROGGE: I was wondering whether we might work out the mechanics of this. There are two cases, one of Fleischman, on which there was a jury verdict, and this one on which the jury just retired.

I have been thinking it over. In the Fleischman matter I was wondering whether I could not argue my motion for a new trial or, in the alternative, for acquittal. I think she is before the Probation Officer today, or will be in a day or two, and I was wondering if Your Honor could stay the sentence a week from Friday.

MR. MURRAY: Two weeks from tomorrow, you mean?

MR. ROGGE: Two weeks from tomorrow, if that is agreeable to everybody concerned.

THE COURT: When is she supposed to see the Probation Officer?

MR. ROGGE: On Monday.

THE COURT: Do you want her to see the Probation Officer before we dispose of the other matters? I suppose it make no difference. It is a matter of convenience, I mean.

MR. MURRAY: That is all right with me.

499 THE COURT: All right.

MR. ROGGE: I might argue the motion for a new trial or acquittal in the Ernestina Fleischman case now, or on the 23rd.

THE COURT: Have you any preference?

MR. MURRAY: No.

THE COURT: I think if we can save you any trips we ought to do it, Mr. Rogge. As far as I am concerned I will be glad to.

Do you know what the situation is with regard to our calendar?

THE DEPUTY CLERK OF COURT: I checked this morning and they said they did have an open date.

MR. GOLDMAN: I think it is six of one and a half dozen of the other.

THE COURT: I didn't hear, Mr. Goldman.

MR. ROGGE: He said why didn't I point out that it would be very short, and we can do it now or on the day of sentence, whichever will be agreeable.

THE COURT: I think we know as much about it now as we will later.

MR. ROGGE: The main point I want to argue to Your Honor is that there was no evidence to go to the jury. It was mostly what I argued to the jury, and the main point, for the record would be served if I—

THE COURT: What do you want to do that 500 for if it would be a repetition of those things?

MR. MURRAY: I don't see it is necessary.

THE COURT: If you want to argue it I am not cutting you off, but it is not necessary; but I know why, you should satisfy yourself so far as your preservation is concerned.

MR. ROGGE: I have already stated what I wanted to urge, and the only other point I want to urge I can confine to as little as thirty minutes.

THE COURT: I am not cutting you off.

(Thereupon counsel retired to the trial table and the following occurred:)

MR. ROGGE: May it please the Court, in the Fleischman case I make a motion and argue orally for acquittal or, in the alternative, a motion for new trial.

THE COURT: I understand you have no objection to this being done orally, Mr. Murray?

MR. MURRAY: No, sir.

MR. ROGGE: Arguing the points previously made, and I want to argue a couple of them, Judge. One of them is the fact that there was just no evidence to go to the jury. Now, there is, in substance, what I argued to Your Honor before. I argued it in my argument to the jury, and I want to repeat it because I think I am right about it.

I asked Your Honor, as I asked the jury, and the jury, it took them four hours to decide.

501 Just what evidence is there as to Ernestina Fleischman? She was a member of the executive board. She could not have been a very active member in its affairs. As a matter of fact, her command of English isn't as good as ours. It was brought out forcefully, although accidentally, that she could not have been very actively engaged, because you had Mrs. Kamsly get on the stand and say, "I was under the impression that she was a member of the board." If she was a very active member of the board there would have been left in Mrs. Kamsly's mind something more than just an impression.

What did Jesse Tolmac give as one of his reasons that she was a member of the board? Well, because she had gotten a subpoena and came down with the rest of them on April 4.

"You never had her in any discussion!"

"Yes, she was at some meetings, but not a crucial meeting," and the evidence shows that she was not at the meeting on February 11, the day I thought was an important meeting in Your Honor's mind.

In other words, here is a woman coming from Spain, who is interested in the relief of anti-Fascist refugees from Franco Spain, so she was sympathetic with the aims of this organization, and I presume spent time at its offices helping in connection with funds and other things, but certainly was not an active member of the executive board.

What do you have in this case? The first subpoena, the first document, was issued in December, and directed either to Helen Bryan, executive secretary, or Dr. Barsky, chairman, and served on Helen Bryan and she responded in January.

Now, it was affirmatively brought out on the witness stand that the witness who came down with Miss Bryan was asked did Ernestina Fleischman know anything about that, and she said she didn't know.

Let's follow, step by step, as to that first document, as to which there were never any contempt proceedings. There is not one shred of evidence that Ernestina Fleischman knew anything about it. You haven't got her in the case yet.

Let's come down to the next step. A document was served on Dr. Barsky—I should point out that at the meeting in December there is no shred of evidence to show who was there, and then you come down to the meeting on February 11, which affirmatively shows that she was not there, and I was quite right in saying to the jury, "Take this document, look at it and see if Ernestina

Fleischman's name was in any way connected with that," and if they did I felt they would return, as they should have, a verdict of not guilty, but they didn't.

But let's look at the evidence dispassionately. I know when we started out with the subpoena that all members of the executive board should be treated alike, but if the factual situation is different you have to treat them differently.

I have asked myself as we have gone along here,
 503 "Just what does the Government have that in any way involves that woman?" So we get down to this meeting of February 11, that involves Dr. Barsky, and Ernestina Fleischman is shown by those very records not to have been present. There was testimony as to a meeting at Bobbie Weinstein's home, but the evidence affirmatively was that Ernestina Fleischman was not there.

That brings us down to one little scrap of evidence which I do not think means anything. Herman Shumlin said that there was a meeting. It does not appear just what kind of a meeting it was. He described it as a board meeting, but there were no minutes introduced with reference to it, and so we don't know. It took place in February before the subpoenas were served, which would be

March 28th, and Dr. Barsky made a report but no action was taken, and no one remembers that Ernestina Fleischman did anything. I thought Mr. Shumlin was rather vague, and Your Honor must remember that he was one of the group, and I do not think his testimony should be taken with the same weight as a disinterested witness. She did nothing and no action was taken.

Let's come to this aiding and abetting theory, and there are times when I think I am clear, and then there are times I am not so sure. Mr. Murray refers to a statute, and it relates to a distinction between aiders and abettors, but they must have committed some crime, and

Ernestina must have known about it.

504 Now, where is there any evidence on this question? The nearest that I could come to it is on one of two theories, and factually there is no support for either of them so far as Ernestina is concerned. I can see where Your Honor could assume that Dr. Barsky was the principal, but it still stretches the point further than I think we can under the law. Suppose Your Honor says Dr. Barsky was chairman and committed the crime in not turning over the books and records just because he was chairman. If you take that step, then I suppose you could say that all those who participated in the meeting of February 11 were aiders and abettors, but you can't go beyond that.

Now, if Ernestina was present at the meeting in March, and the evidence is vague that she was, and this is something that took place after February 11, and I say to Your Honor that you can't have an aider and abettor after the fact. There just isn't such a thing under the law.

So, following through the theory on aiding and abetting, I still come out to the conclusion with reference to Ernestina,—zero.

Now, there is one other possibility; Your Honor could say, "Oh, but there was the subpoena on the organization to which Helen Bryan responded on April 4," and I am really trying to follow the only two possible tenable theories

505 on any stretch of the imagination. I mean I would like to stay somewhere within the reasonable realm of the law, and unless you stick on one of those two courses you don't do even that. The other one is that the subpoena was served on the organization and Helen Bryan responded, and that Helen Bryan by not turning over the books and records really committed the crime, and then in this situation, so far as I know, and I am trying to think it through, if that was the crime, Ernestina aided and abetted her.

Let's take the Wilson case, and this is the furthest I have known the law to be pushed, and I think it goes

too far and the Supreme Court must reverse. The language of the court is a comment to this respect, "If they fail to take appropriate action."

Now, what evidence is there that Ernestina knew that a writ had been served on the Joint Anti-Fascist Refugee Committee? Judge, let's look at this in the calm light of reason. There isn't any. I am satisfied she didn't know about a writ served on the association to which Helen Bryan responded. After all, you have to have guilty knowledge, and you don't have it in this case. What do you have, Judge? You have a more or less inactive member of an executive board who, on March 29, was served with a document which Your Honor has ruled is a subpoena, and which the House Committee thought of for the first time on March 28th. Now, you have nothing up to that point. All right.

506 " So Ernestina Fleischman gets one of these documents on March 29th. Where is there any evidence, when she came down here on April 4, which she was required to do by that subpoena, where is there any evidence that she had the slightest pretense of knowledge as far as the subpoena on the association was concerned, and I submit you have to have that? I mean, I am trying to think it out, at least some little bit of solidity to a theory that I can feel at least there is an argument that has some weight, and I just don't find it in this case.

You can't tell me she can be an aider and abettor to other aiders and abettors. That is something that just don't make sense. You must have somebody who committed a crime, and Ernestina has to have knowledge of it, and aided and abetted the principal in it.

I see, now that I have got started, I have taken more time than I should, but I say there should have been an acquittal. But it goes on to say, "If they fail to take appropriate action."

You have a woman who, the first she knows, on the 29th she gets a document. What, I ask, would you expect

that woman to do in order to keep from being guilty under the theory of this case? What could we expect her to do? She came down here on April 4 with the rest of them. The only other thing you get down to on that is what she would do in the future. I ask you, Judge, has that become a crime? You have nothing else. You 507 can't regard her an aider and abettor by regarding Helen Bryan as principal in not turning over the books and records, and the Government has been insisting, in the Barsky case they argued she was a scapegoat, and here that she did it on her own responsibility, but I am just trying to test where you have any solid ground, and I say you have two possible theories:

One, Dr. Barsky was the principal, and that she aided and abetted him, and there is no evidence that she knew anything about it until long after that time.

The other theory is that Helen Bryan was the principal on April 4, and that she aided and abetted Helen Bryan, but there isn't any evidence that she knew, and you have to have that, under the Court of Appeals opinion in the Barsky case. She had to be apprised of the writ directed to the organization, and there isn't any evidence that she had any such knowledge, and as far as the last argument when Mr. Murray dwelt on what she should do in the future, certainly Your Honor isn't going to hold that a statement of intention as to what one is going to do in the future can be a crime—I am not even going to argue it.

Your Honor ruled on the quorum feature. I submit that is a question of fact, not a question of law; that the burden was on the Government to show beyond a reasonable doubt, and I won't go into the authorities. I 508 argued it before in the Christoffel case, and the matter is up in the Court of Appeals, but I say under the authorities the burden was on the Government to show beyond a reasonable doubt that a quorum was present when Ernestina was sworn, and when she gave her testimony;

that the Government has not met that burden; that that cannot be met by any kind of presumption, if there is any kind of presumption, which I also deny, under the authorities, about a quorum being present.

But even if there were such an abstract presumption, the presumption of innocence overrides any such abstract presumption, and that Your Honor was in error in ruling on the quorum point as a matter of law.

I want to preserve the other points. As Your Honor pointed out, I think they are preserved anyway, but on the quorum point, in our argument previously given on the motion for acquittal, and we argue again to Your Honor that there is just no evidence on which, on any possible theory on a factual basis, that Ernestina Fleischman is guilty of a crime, and that Your Honor should rule in Ernestina Fleischman's favor on my motion for an acquittal.

THE COURT: What are your authorities on the quorum matter?

MR. ROGGE: I have a small memorandum.

THE COURT: All right; that is satisfactory to the Court.

509 MR. ROGGE: The one filed in the Christoffel case was much longer, but this reduces the substance of it to about five pages, and I should add to this memorandum that the question of whether the quorum was actually there is a question of fact and not a question of law, and Your Honor has treated it as a question of law.

THE COURT: Mr. Murray?

MR. MURRAY: Your Honor, I have no comment to make. Mr. Rogge has restated in his present argument the principal basis for that which he stated when he asked the Court to direct a judgment of acquittal before letting the case go to the jury. The Court ruled on that motion on the basis of argument on both sides and I, therefore, will not repeat my side of that argument.

But this is the second or third time that Mr. Rogge has argued that the Wilson case in 221 U. S. is applicable to this situation to the extent of requiring the Government to show in the Fleischman trial that Mrs. Fleischman knew about the subpoena served on the corporation. Now, I say that is not the sense of that decision for this reason: In the Wilson case there was only one subpoena, and that subpoena was issued to the corporation by name; therefore, as the court was saying, in order to hold any individual responsible for failure to comply with that subpoena, of course, it must be shown that he had personal knowledge that the subpoena had been issued 510 and served. That would go to the extent of saying that if the subpoena issued and served on the corporation, and served not on me but on another officer, and I came back and found out about that, I would then have a duty to do what I could to comply with that notice. That is as far as the Wilson case went.

But in this case we have individual subpoenas served on the individual members of the executive board, including Mrs. Fleischman.

I shall read from the same case, the Wilson case, but begin a couple of pages before Mr. Rogge did. I shall read now from page 374 of 221 U. S.:

"Where the documents of a corporation are sought the practice has been to subpoena the officer who has them in his custody. But there would seem to be no reason why the subpoena duces tecum should not be directed to the corporation itself"—and then it goes on two pages further:

"Concluding, then, that the subpoena was valid and that its service imposed upon the corporation the duty of obedience, then there can be no doubt that the appellant was likewise bound by it unless, with respect to the books described, he could claim a personal privilege.

511 "A command to the corporation is in effect a command to those who are officially responsible

for the conduct of its affairs. If, however, apprised of the writ directed to the corporation, to prevent compliance or failure to take appropriate action within their power for the performance of the corporate duties, they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt."

So that in this case the Congressional Committee exercised the precaution of issuing a subpoena not only to the corporation but every individual member of the board and, of course, that put that individual upon whom it was served on the best possible notice.

THE COURT: If you have anything to submit on the question of quorum you may do it.

MR. MURRAY: I will be glad to submit a brief memorandum.

MR. ROGGE: As a matter of fact, Judge, this is a very brief treatment of it for my own purposes. I had another memorandum which I had prepared in the Christoffel case, and I will be glad to give Your Honor a copy, and also Mr. Murray.

THE COURT: All right, gentlemen, I will take it.
(Thereupon the instant hearing was concluded.)

512

Certificate of Court Reporter

I, Ralph E. Minier, an official reporter for the District Court of the United States for the District of Columbia, do hereby certify that the foregoing is the official transcript of proceedings in said Court in the above-entitled cause.

Ralph E. Minier
Official Court Reporter.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

Monday, February 7, 1949

Before Honorable HENRY W. EDGERTON, E. BARRETT PRETTYMAN
and JAMES M. PROCTOR, Circuit Judges:

No. 9851, January Term, 1949

HELEN R. BRYAN, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

No. 9852, January Term, 1949

ERNESTINA G. FLEISCHMAN, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

On motion of Mr. O. John Rogge, attorney for appellants, Mr. Benedict Wolf of the Bar of the Court of Appeals of New York was permitted to argue for appellants pro hac vice by special leave of Court.

Argument commenced by Mr. Benedict Wolf for appellants, continued by Messrs. O. John Rogge for appellants and Charles B. Murray, attorney for appellee, and concluded by Mr. O. John Rogge.

United States Court of Appeals for the District of Columbia Circuit

Filed Apr. 8, 1949, Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit

No. 9852

ERNESTINA G. FLEISCHMAN, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of Columbia (now the United States District Court for the District of Columbia).

Argued February 7, 1949

Decided April 8, 1949

Mr. Benedict Wolf of the bar of the State of New York, *pro hac vice*, by special leave of Court, and Mr. O. John Rogge for appellant.

Mr. Charles B. Murray, Assistant United States Attorney, with whom Mr. George Morris Fay, United States Attorney, was on the brief, for appellee. Mr. John D. Lane, Assistant United States Attorney, also entered an appearance for appellee.

Before EDGERTON, PRETTYMAN, and PROCTOR, JJ.

EDGERTON, J.: Appellant has been convicted of willfully making default before the Committee on Un-American Activities of the House of Representatives, after being summoned to produce before it the records of the Joint Anti-Fascist Refugee Committee. A single indictment charged this appellant and the defendants in the *Barsky* case.¹ Appellant was tried separately.

The indictment alleged the defendants "were summoned to produce before the Congressional Committee on April 4, 1946, records . . ." and "appeared before the Congressional Committee" on that day "but failed to produce the records called for in the subpoena, as they had power to do, and thereby wilfully made default." The proof showed that this appellant appeared before some members of the Congressional Committee on April 4 and did not produce the records but testified she could not produce them because they were not in her possession or control.

¹ *Barsky v. United States*, — U. S. App. D. C. —, 167 F. 2d 241; cert. denied, 334 U. S. 843; petition for rehearing pending.

There is, by definition, no meeting of a committee unless a quorum is present. A quorum of the Congressional Committee was five members. Whether five members were or were not present was a disputed question of fact. It was a material question, assuming there was evidence that (contrary to her own testimony) the records were in appellant's control.² On that assumption, therefore, the question whether a quorum was present should have been submitted to the jury. But the court instructed the jury, over objection, that "as a matter of law . . . the members of the committee before whom the defendants appeared, pursuant to the subpoenas served on them, constituted a sufficient quorum to carry on the investigation." We think this was error. Even if the evidence that a quorum was present had been conclusive the instruction would have been erroneous. In a criminal case "a judge may not direct a verdict of guilty no matter how conclusive the evidence"³ nor direct the jury to find a material fact against the defendant.⁴

A person summoned to testify before a committee cannot commit perjury unless the committee meets. This is conceded. Although the government concedes also that perjury and willful default are analogous in this respect,⁵ the dissenting opinion suggests that if a person summoned to produce records before a committee expresses unwillingness to do so he "willfully makes default" whether the committee meets or not. We think the quoted words cannot bear that construction.

The applicable statute is directed against "every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before . . . any committee of either House of Congress, willfully makes default."⁶ "Default" is, of course, failure to comply with the summons. Appellant, summoned to produce records before the Congressional Committee, could not comply with the summons unless the committee met. Production before some members of the committee, absent a quorum, would not be a compliance. So much is clear and undisputed. Unless the appellant could comply with the summons she could not be guilty of willfully making default. Failure to do what cannot be done is not a willful

² Judge Proctor agrees with Judge Prettyman that there was such evidence. I think there was none. The question is discussed at the end of this opinion.

³ *United Brotherhood of Carpenters v. United States*, 330 U. S. 395, 408.

⁴ *Konda v. United States*, 166 Fed. 91.

⁵ The government urges that a quorum of the Committee was present.

⁶ 2 U. S. C. § 192, R. S. § 102 as amended, 52 Stat. 942.

crime. Neither is failure, however expressed, to desire and attempt it. The appellant could not be guilty of anything more than this unless the Congressional Committee met.

Judge Proctor concurs in so much of this opinion. The judgment is therefore reversed and the case remanded. Judge Proctor does not concur in the rest of this opinion and therefore I speak only for myself.

If it was impossible to produce the records before the Congressional Committee, which it plainly was if the Committee did not meet, appellant's supposed unwillingness to produce them is immaterial because it had no practical effect. A will or desire or intention that has no practical consequences has no legal consequences. Whatever a defendant's intention may be, and however emphatically he may announce it, he commits no crime unless he is guilty of some act or omission that causes a prohibited event. The statute does not prohibit willfully expressing a desire or intention to make default. It prohibits only willfully making default. Our system of law does not take the will for the deed. To paraphrase what the Supreme Court said when we treated another statute as dispensing with another fundamental principle, "We cannot but think that if Congress had intended to make such a drastic departure from the traditions of [our law], an unequivocal statement of its purpose would have been made."⁷

Since a bad intention and a prohibited event do not make a crime, proof of them does not make a case. There is no presumption that if a defendant desired a thing, and it happened, he did it. If it is proved in a murder trial that the defendant expressed an intention to kill a man, and that the man was killed, the government must still convince the jury that the defendant killed him. If it was proved that this appellant expressed an intention not to comply with the summons, and that the summons was not complied with, the government must still convince the jury that noncompliance was caused by some act or omission of the appellant.

The assumption that the appellant had control of the records and refused to produce them, or expressed unwillingness to do so or an intention not to do so, has been shown to be immaterial unless the Congressional Committee met. In my opinion the assumption is also erroneous. Appellant testified without contradiction that she could not produce the records because they were not in her possession or control. She refused to express either willingness or unwillingness that they be produced.⁸ Even this refusal did not occur until she

⁷ *Hecht Co. v. Bowles*, 321 U. S. 321, 329.

⁸ "The Chairman: Mrs. Fleischman; I am going to ask you now for your personal permission. I am requesting you personally to permit this committee of Congress to have access to those books. Will you give it to us or not? So far as you are able to do, will you give it to us?"

was questioned by members of the Congressional Committee on April 4. The records were in possession of one Bryan, subject to control by an Executive Board of about 18 members of whom appellant was one. Long before April 4 Bryan, directed by other members of the Board but not by the appellant, had determined not to produce the records. There is no evidence that appellant ratified or approved the action of the other members of the Board. The government says "In taking part in a combined action to withhold records from a Congressional Committee the appellant acted at her own peril." But I have not been able to find any evidence, and no evidence has been pointed out, that the appellant took part in a combined action to withhold records. It has been suggested that she might have asked the Board, or Bryan, to produce the records. But there is no evidence that if she had asked them they would have complied. There is no evidence that the nonproduction of the records in the committee-room resulted either from anything the appellant did or from anything she omitted to do. This makes it quite immaterial whether or not the Congressional Committee met. The court should have directed a verdict of acquittal. The *DeJonge*, *Herndon* and *Schneiderman* cases,⁹ holding that things said or done by an organization cannot be attributed to a member merely because of his membership, are directly in point. Guilt, like belief, is "personal and not a matter of mere association."¹⁰

We need not consider the questions raised in the *Barsky* case¹¹ or whether government employees were qualified jurors.

Reversed.

PRETTYMAN, J., *dissenting*: I think this judgment should be affirmed, and because the disputed point is important in congressional committee proceedings, I state the reasons for my view.

The court finds error in that part of the trial judge's charge in

"Mrs. Fleischman: That is expressing my opinion, Mr. Chairman. I cannot say what the board will do.

"The Chairman: I am not asking what the board will do. I am asking what you will do.

"Mrs. Fleischman: I do not know, because the thing comes to the board to discuss, and I don't think it is pertinent to say what I should do a week from now. It is a special meeting."

I know of nothing else in the record that comes nearer than this to supporting an inference that appellant refused to produce the records or expressed unwillingness to produce them.

⁹ *DeJonge v. Oregon*, 299 U. S. 353; *Herndon v. Loury*, 301 U. S. 242; *Schneiderman v. United States*, 320 U. S. 118.

¹⁰ *Schneiderman v. United States*, *supra* note 9, at 136.

¹¹ *Supra*, note 1.

which he said, at the end of a long sentence concerning the House Committee, its constitution and jurisdiction, and the issuance and pertinence of the subpoena, ". . . ; that the members of the committee before whom the defendants appeared, pursuant to the subpoenas served on them, constituted a sufficient quorum to carry on the investigation." I find no error—certainly no reversible error—in the judge's observation, because I think that the presence of a quorum was immaterial to the issues presented by the case when the parties rested. If the judge had said that a quorum need not have been present under the circumstances, he would have been correct. *A fortiori* he committed no error when he said that those present were sufficient.

The indictment was for a willful default in failing to respond to a subpoena. A default is negative. It is not an act but is a failure to act. A person subpoenaed to produce books consciously and deliberately does not produce them. He is in default.

The statute under which the indictment was brought, provides in pertinent part, "Every person who having been summoned as a witness by the authority of either House of Congress . . . , willfully makes default, . . . shall be . . .", etc.¹ This statute describes an offense of omission. The provision generally applicable to court subpoenas is Rule 45(f) of the Federal Rules of Civil Procedure—"Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued." That Rule refers to "Failure . . . to obey". It is not limited to refusal or to any other affirmative action.

A willful default may be evidenced by a declared refusal to respond, or it may be simply a deliberate failure to do anything. A subpoenaed person might appear before the full committee and elaborately, vociferously and defiantly declaim his rebellion against the summons and the committee. Another subpoenaed person might, without saying anything to anybody, but with deliberate resolve to avoid obedience, simply go fishing on the appointed day. The latter's default is as complete as that of the former. Whatever may be the factual circumstances, the default is completed when the summons is not obeyed, and if the disobedience is intentional, a willful default has occurred.

What happened in the case at bar? These persons were served with subpoenas. They made carefully prepared public statements. The statements were not offers of, or even gestures toward, compliance with the subpoenas. They were in part evasion and in part an assertion of reasons for non-compliance. Each member of the Executive Board said that he, or she, had no custody of or control

¹ REV. STAT. § 102, as amended, 52 STAT. 942 (1938), 2 U. S. C. A. § 192.

over the books, that the Executive Secretary did, that he (the Board member) would not say whether he would consent to compliance in so far as he had power to do so; and the Executive Secretary said that the Executive Board had control over her and also that she was of opinion that the subpoena was not valid and, therefore, she could not comply with the Committee's "request". This appellant was present when the avowals were made, and she made precisely the same statement as did the other Board members. The burden of their briefs and argument here is that the subpoenaed persons did not have to comply. These tactics may ultimately be effective. But they do not obscure the undisputed simple facts that the persons summoned by the subpoenas did not produce the books; that they intended not to produce them; and that they made clear their intention by public statements.

The point presently at issue is whether a quorum of the Committee had to be present at the time and place when and where the subpoenaed persons made the public statements which evidenced their intention not to obey the summons. The point resolves into two questions. Is the presence of a quorum under such circumstances and for that purpose an essential element of a *prima facie* case of willful default? If not, was it made material by any plea of the defendants?

The trial judge told the jury that the elements of the offense are (1) a valid subpoena, (2) legal service, (3) custody, dominion or control over the records, and (4) a willful failure to produce. I think that was correct. I think that it makes no difference whether a subpoenaed person actually makes a declaration of refusal to comply or, if he makes one, who hears it. I think that if these persons had intentionally stayed in New York and done nothing, they would have committed willful default. To be sure, an intent to default is plainer if there be a proclaimed refusal to respond. But such proclamation is not essential; much less is it essential that there be a proclamation of refusal in the presence of a quorum of the Committee. A stated refusal to respond is merely evidence of intent and might be made to members of the Committee, one member, a representative, or someone not connected with the Committee; or intent might be proved without any specific declaration of refusal. A default, in my view, is complete when there is an intended failure to respond to the subpoena.²

It is perfectly true that if a witness seeks to comply with a subpoena but no quorum of the committee is present to receive his testimony, he would not be guilty of default. But the absence of the quorum in such a situation would be part of a defense of willingness

² See *Blair v. United States*, 250 U. S. 273, 63 L. Ed. 979, 39 S. Ct. 468 (1919), and *Brown v. United States*, 276 U. S. 134, 72 L. Ed. 500, 48 S. Ct. 288 (1928), for discussion of required conduct of a subpoenaed person.

to comply. That the defense would be effective would not make the negation of its elements an essential of proof of the offense. Such is frequently the situation in criminal cases. Facts may be pertinent to a defense, but absence of such facts is not an essential element in proof of the crime. The prosecutor is not required to negative every conceivable circumstance which might be adequate as an explanation or excuse or reason for an offense. How does such a circumstance become material in a case? Only by being pleaded as an essential element of a defense. So with the absence of a quorum of a committee at the time and place designated in a subpoena. If a person charged with default should assert that he was ready and willing to comply, but that he did not comply because no quorum was there, he would thereby make the presence of a quorum a material issue. There was no such assertion or plea in the case at bar. Appellant does not assert that a quorum was not present to receive her ready testimony. She says that a quorum should have been present to hear her refusal to testify. What, I query, would be the situation if the subpoenaed persons had stayed in New York and proclaimed their refusal to a general press conference? Or had telegraphed it to the Chairman of the Committee? It seems to me that when the prosecution proved disobedience of the subpoena and established the intent to disobey by proving appellant's declaration of refusal to obey, its case was complete. Appellant could then have pleaded and proved a complete defense by showing that she was present, ready and willing to produce the books but that no quorum of the Committee was at the appointed place to receive them.

The court reasons that appellant could not have complied (the quorum not being present) if she had wanted to, and that, therefore, she was not in default. That is to say that although the prosecution proved that appellant did not comply and had no intention of complying, nevertheless it must also prove that if, contrary to the fact, she had wanted to comply, the Committee was there. I do not think so. It is not necessary to present proof upon a wholly hypothetical supposition, completely divorced from the pleaded or asserted issues. Appellant says *suppose* she had wanted to comply. She cannot defend that way. Courts and juries do not deal with purely speculative defenses. Only by a plea to which the absence of a quorum is an essential element would the quorum become a material issue in the case.

Appellant contends, and this court holds, that although a plea of willingness to comply was not made, the question of whether a quorum of the Committee was present when these persons made their statements of non-compliance, was a material issue of fact which should have been submitted to the jury for decision. That means one of two things, either that the presence of a quorum at the time and place indicated in a subpoena, or at the time and place of a

declaration of non-compliance, is an essential element of a *prima facie* case of willful default, or that the prosecution must negative a possible, but not pleaded, defense. Neither proposition is sound, in my opinion.

My view is that if failure to comply and intention not to comply are proved, and if the accused does not assert that he wished and tried to comply, it is immaterial whether he appeared before a quorum or not. Therefore, I do not think it was error for the trial court to fail to submit to the jury, as a material issue in this case, the question of fact whether there was or was not a quorum of the Committee present when appellant made her statement.

The supposed analogy to the quorum question in perjury cases, e.g., *Christoffel v. United States*,³ is error, as I see it. There is no analogy. Perjury is an affirmative act. The accused must do something; he must testify falsely. And to constitute the statutory offense, the false testimony must be before a competent tribunal. If the tribunal is a committee, a quorum must be present in order to make it competent. I see no analogy to the offense of failing to act.

I am not sure what my brethren intend to hold as to the time and place when and where the quorum must be present to complete a default. This subpoena required the witness to be present at 10 a. m. on April 4th. It was afternoon (the late hour not being her fault) when she actually made her statement, indicating her refusal to respond to the subpoena. I am not certain whether the court holds that a quorum must have been present at 10 a. m., or must have been present at the time when the witness stated that she would not produce the books; and I do not understand what the rule would be if the witness stood out in the hallway and declared to the assembled press or other auditors that she would not go into the Committee room, or would not produce the books, or if she had stayed in New York and not come to Washington at all. All these questions are most pertinent, it seems to me, to a rule of law that the presence of a quorum of a committee is an essential element of the offense of willful default.

Of less importance than the foregoing, I note that there was categorical evidence that a quorum was present when appellant made her statement of refusal. Mr. Adamson testified: "They had a majority of the Committee there all the time, Mr. Rogge. . . . Yes. I am pretty sure they had at least five men present all through the day; but which five they were I would not undertake to say."

I most emphatically do not rest my view upon appellant's state of mind. I rest it upon her failure and refusal to comply with the

³ — U. S. App. D. C. —, 171 F. 2d 1004 (1948).

subpoena to the extent of her power to do so. Her failure to comply, not the state of her mind, is the basis.

The foregoing is by way of dissent from the judgment of the court. I now state my view upon the question whether the District Court erred in not directing a verdict of acquittal. In the conclusion upon this point, Judge Proctor and I are in agreement.

The indictment was a joint one. It charged that "each and all of the defendants" willfully made default. The subpoena had directed this appellant to produce the books, etc., of the Joint Anti-Fascist Refugee Committee before the Congressional Committee in its chamber in Washington on April 4, 1946, at 10 o'clock, a. m. The persons subpoenaed, except Miss Bryan, constituted the Executive Board of the Joint Anti-Fascist Refugee Committee. The Executive Board was the highest authority of the Committee and controlled the policies and actions of the organization. As we have said, all members appeared at the designated time and place, and each, in turn, stated that he or she did not have possession, custody or control over the books; that Miss Bryan, the executive secretary, did. Each member of the Board was then asked whether he or she was willing, as a member of the Board, to permit the Congressional Committee to see the books; whether he or she would give consent to the Committee to see the books. Each member, including this appellant, replied that he did not know what he would do, that it was a matter for the Board to decide.

It seems perfectly clear from the foregoing that the members of the Executive Board jointly failed to comply with the subpoena. I return to the basic proposition in this case, that what these defendants did is not the essential fact; the essence was what they did not do. This was an offense of omission, not of commission. They, together, in concert, did not obey the subpoena. All participated. This appellant definitely and affirmatively joined with the others, to the extent of her power, in not complying. She was not indicted for failure by the others. She was indicted for her own failure. She, in Washington, on April 4, 1946, by announced purpose and act, refused to comply with the subpoena.

The claim by each member of the Executive Board that he had no control over the books is pure sophistry, to my mind. To be sure, he did not, as an individual, separate and apart from his fellow members. But the proposition that the members of a Board can jointly and unanimously refuse to direct an employee to produce books upon a court order, and then successfully avoid responsibility for the willful default by splitting their joint act into several separate individual acts, is wholly untenable.⁴ I would have a lively

⁴ See Bough 1. Lee, 29 F. Supp. 498, 501 (D. C. S. D. N. Y. (1939).

curiosity as to the outcome of many sorts of litigation if that doctrine were established as to all actions, or failures to act, by executive boards, boards of directors, or boards of trustees. It seems to me that orders of courts, directed to such bodies or their employees, would be meaningless under that concept. Employees are surely under the control of the top authority of the organization. If the top authority could dissolve its joint control into nothingness by simply asserting that no one of them individually had control, no order upon an organization, corporate or joint, would be effective.

Some reference is made to meetings of the Executive Board in New York, not attended by this appellant. The default did not take place in New York or at any date prior to April 4, 1946. It occurred when these defendants did not produce the books in Washington on April 4th. This appellant participated in person and by a personal declaration in that failure.

Judge Proctor and I think that in respect to the sufficiency of the evidence the trial court was correct.

United States Court of Appeals for the District of Columbia Circuit
April Term, 1949

No. 9852

ERNESTINA G. FLEISCHMAN, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Filed Apr. 8, 1949. Joseph W. Stewart, Clerk.

Appeal from the District Court of the United States for the District of Columbia (now United States District Court for the District of Columbia)

Before: EDGERTON, PRETTYMAN and PROCTOR, JJ.

Judgment

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, now United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that

this cause be, and it is hereby, remanded to the said District Court with directions to award a new trial.

Per Circuit Judge EDGERTON.

Dated April 8, 1949.

Dissenting opinion by Circuit Judge Prettyman.

United States Court of Appeals for the District of Columbia Circuit: Filed May 24, 1949. Joseph W. Stewart, Clerk.

In the United States Court of Appeals for the District of Columbia Circuit

No. 9852

ERNESTINA G. FLEISCHMAN, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Designation of Record

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for a writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Appellee.

May 24, 1949.

Certificate of Service

I hereby certify that I have this day served a copy of the Designation of Record on O. John Rogge, Esquire, 401 Broadway, New York, N. Y., and on Benedict Wolf, Esquire, 160 Broadway, New York, N. Y., by mailing copies to them at their business addresses.

PHILIP B. PERLMAN,
Solicitor General.

Dated at Washington, D. C., this 24th day of May, 1949

United States Court of Appeals for the District of Columbia Circuit

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, formerly United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered 1 to 315, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and the proceedings of the said Court of Appeals as designated by counsel in the case of: Ernestina G. Fleischman, Appellant, v. United States of America, Appellee, No. 9852, April Term, 1949, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this twenty-fifth day of May, A. D. 1949.

[SEAL.]

(S.) JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia Circuit.

In the Supreme Court of the United States, October Term, 1948

No. —

UNITED STATES, PETITIONER

v.

ERNESTINA G. FLEISCHMAN, RESPONDENT

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

1. For the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining the case on the merits, the printed record shall consist of the following:

(a) Joint Appendix to Appellant's Brief.

(b) The proceedings had before the United States Court of Appeals for the District of Columbia Circuit as set forth in the Designation of Record filed by the Petitioner.

2. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia Circuit to file with the Clerk of the United States Supreme Court the entire transcript of record in the United States Court of Appeals for the District of Columbia

Circuit, and any of the parties may refer in their briefs and arguments to said transcript of record, including any part which has not been printed.

May 24, 1949.

PHILIP B. PERLMAN,
Solicitor General,
Counsel for Petitioner.

O. JOHN ROGGE,
Per: MURRAY A. GORDON,
BENEDICT WOLF,
Counsel for Respondent.

Per: MURRAY A. GORDON,

Supreme Court of the United States

Order allowing certiorari

Filed October 17, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.